Supreme Court, U.S.
FILED

97 1866 MAY 19 1998

OFFICE OF THE CLERK

No._____

In The
**SUPREME COURT OF THE UNITED STATES**

October Term, 1997

---

**INTERSTATE INDEPENDENT CORPORATION,**

*Petitioner,*

v.

**THE BOARD OF ZONING APPEALS FOR FAYETTE COUNTY AND THE VILLAGE OF OCTA,**

*Respondent.*

---

On Petition for a Writ of Certiorari
To the Ohio Supreme Court

---

# PETITION FOR A WRIT OF CERTIORARI

---

J. MICHAEL MURRAY
(counsel of record)
BERKMAN, GORDON, MURRAY & DeVAN
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113-1949
(216) 781-5245
Attorney for Petitioner

Of Counsel:
JEREMY A. ROSENBAUM
BERKMAN, GORDON, MURRAY
& DeVAN

10 pp

## QUESTIONS PRESENTED FOR REVIEW

A Village's zoning and permit ordinance allows retail businesses serving primarily the highway traveler to open, as a matter of right, in its one active business district. Petitioner reopens an adult video arcade, a speech business, in the business district. The enforcing authority invokes, interprets and applies the ordinance to restrain, prohibit and ban the use. As a result, petitioner's speech business is closed under a prior restraint, which has continued now for nearly five years, while the matter is litigated in local administrative and local and state judicial proceedings. Each stage of those proceedings is punctuated by petitioner's protests and objections that the unjustified prior restraint occasioned by the enforcement of the ordinance, including the ensuing protracted litigation, violates the dictates of the First and Fourteenth Amendments as set forth in this Court's decisions –

1. In directing, facilitating, condoning, sustaining, continuing, and finding constitutional, under the First Amendment, the prior restraint imposed against petitioner's speech business, did the Ohio courts grossly depart from the teachings of Freedman v. Maryland, 380 U.S. 51 (1965), Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981) and FW/PBS, Inc. v. City of Dallas, 439 U.S. 215 (1990)?

2. Does the Village's zoning and permit ordinance, as interpreted and applied to restrain, prohibit and ban petitioner's speech business from opening anywhere within the Village's borders, violate petitioner's First and Fourteenth Amendment rights?

## LIST OF PARTIES

The parties to the proceedings in the state courts were Interstate Independent Corporation as appellant and the Board of Zoning Appeals for Fayette County and the Village of Octa as appellee.

There are no parent or subsidiary companies of Interstate Independent Corporation.

## TABLE OF CONTENTS


Page

QUESTIONS PRESENTED FOR REVIEW ..... i

LIST OF PARTIES ..... ii

TABLE OF AUTHORITIES ..... vii

PETITION FOR A WRIT OF CERTIORARI ..... 1

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL PROVISIONS AND ORDINANCE INVOLVED ..... 2

STATEMENT OF THE CASE ..... 2

REASONS FOR GRANTING THE WRIT ..... 17

CONCLUSION ..... 18

APPENDICES

Opinion of the Court of Appeals for the Twelfth Appellate District (October 20, 1997) ..... 1a

Judgment Entry of the Court of Appeals for the Twelfth Appellate District (October 20. 1997) ..... 21a

Entry of the Court of Appeals of Fayette County (November 20, 1997) ..... 23a

**TABLE OF CONTENTS (cont'd)**


Page

Assignments of Error to the Court of Common Pleas of Fayette County ..... 25a

Entry of the Supreme Court of Ohio (February 18, 1998) ..... 26a

Propositions of Law to the Ohio Supreme Court ..... 27a

Judgment Entry of the Court of Common Plea of Fayette County (October 11, 1996) ..... 28a

Decision of the Board of Zoning Appeals of Fayette County, Ohio ..... 31a

Decision of the Board of Zoning Appeals of Fayette County, Ohio (December 6, 1994) ..... 39a

Opinion of the Court of Appeals for the Twelfth Appellate District (October 17, 1994) ..... 43a

Judgment Entry of the Court of Appeals For the Twelfth Appellate District October 17, 1994 ..... 53a

Entry Denying Motion for Reconsideration of the Court of Appeals of Fayette County (November 28, 1994) ..... 55a

**TABLE OF CONTENTS (cont'd)**


Page

Entry of the Supreme Court of Ohio (March 15, 1995) ..... 58a

Judgment Entry of the Court of Common Pleas of Fayette County (March 22, 1994) ..... 59a

Journal Entry of the Court of Common Pleas of Fayette County (October 15, 1993) ..... 66a

Temporary Restraining Order of the Court of Common Pleas of Fayette County (August 20, 1993) ..... 71a

Constitution of the United States

First Amendment ..... 73a

Fourteenth Amendment ..... 73a

Village of Octa, Ohio Zoning Ordinance

Octa Zoning Ordinance § 4.14 ..... 74a

Octa Zoning Ordinance § 5.0 ..... 74a

Octa Zoning Ordinance § 6.01 ..... 74a

Octa Zoning Ordinance § 6.02 ..... 75a

## TABLE OF CONTENTS (cont'd)


Page

Octa Zoning Ordinance § 6.03 ..... 75a

Octa Zoning Ordinance § 6.032 ..... 75a

Octa Zoning Ordinance § 7.1-7.18 ..... 76a

Octa Zoning Ordinance § 8.1-8.11 ..... 76a

Octa Zoning Ordinance § 8.12-8.13 ..... 77a

Octa Zoning Ordinance § 10.1-10.11 ..... 77a

Octa Zoning Ordinance § 14.3 ..... 77a

Octa Zoning Ordinance § 14.4-14.41 ..... 78a

Octa Zoning Ordinance § 15.22 ..... 79a

Octa Zoning Ordinance § 15.23 ..... 80a

## TABLE OF AUTHORITIES

Page

CASES

Bantam Books, Inc. v. Sullivan,
372 U.S. 58 (1963) ..... 12

City of Lakewood v. Plain Dealer Publishing Co.,
486 U.S. 750 (1988) ..... 13, 17

City of Renton v. Playtime Theater, Inc.,
475 U.S. 41 (1986) ..... 12, 14, 15, 17

Freedman v. Maryland,
380 U.S. 51 (1965) ..... i, 4-6, 11-17

FW/PBS, Inc. v. City of Dallas,
439 U.S. 215 (1990) ..... i, 13, 17

Incorporated Village of Octa v. The Interstate
Adult Arcade, Case No. 930262 CVH,
Fayette County Court of Common Pleas,
CA94-04-002 (12th App. Dist. 1994). ..... 3,4, 8, 9

Lovell v. Griffin, 303 U.S. 444 (1938) ..... 12

Schad v. Borough of Mt. Ephraim,
452 U.S. 61 (1981) ..... i, 4, 6, 11, 12, 14-17

Shuttlesworth v. Birmingham,
394 U.S. 147 (1969) ..... 13

Young v. American Mini Theaters,
427 U.S. 50 (1976) ..... 12,14, 15, 17

## TABLE OF AUTHORITIES (cont'd)

Page

CONSTITUTIONAL PROVISIONS

United States Const., Amend. I ..... i, 2, 11, 12, 15-17

United States Const., Amend. XIV ..... i, 2

STATUTORY AND CODIFIED ORDINANCE PROVISIONS

28 U.S.C. §1257 ..... 1

Octa Zoning Ord. § 10.11 ..... 4, 14, 15

Octa Zoning Ord. § 14.41 ..... 4, 5, 16

Octa Zoning Ord. § 15.23 ..... 5

Octa Zoning Ord. § 5.0 ..... 4

Octa Zoning Ord. § 6.01 ..... 4

Octa Zoning Ord. §§ 7.1-7.18 ..... 4, 14

Octa Zoning Ord. §§ 8.11-8.13 ..... 4, 14

MISCELLANEOUS

Supreme Court Rule 10(c) ..... 17

## PETITION FOR A WRIT OF CERTIORARI

Interstate Independent Corporation respectfully petitions for a writ of certiorari to review the judgment of the Ohio Supreme Court in this case.

## OPINIONS BELOW

The judgment of the Ohio Supreme Court dismissing Interstate's appeal for lack of a substantial constitutional question is set forth in the Appendix at 26a. The opinion and judgment entry of the Court of Appeals for Fayette County, Ohio, Twelfth Appellate District is set forth at 1a-22a. Its entry denying petitioner's application for reconsideration is set forth at 23a-24a. The final judgment of the Court of Common Pleas of Fayette County, Ohio is set forth at 28a-30a. The opinions of the Board of Zoning Appeals for Fayette County and the Village of Octa are set forth at 31a-38a and 39a-42a.

## JURISDICTION

The judgment entry of the Court of Common Pleas of Fayette County, Ohio was entered on October 11, 1996. (28a.) The opinion and judgment of the Court of Appeals for Fayette County, Ohio, Twelfth Appellate District was entered on October 20, 1997. (1a and 21a.) Its denial of reconsideration was entered on November 20, 1997. (23a.) The judgment of the Ohio Supreme Court was entered on February 18, 1998. (26a.) The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

## CONSTITUTIONAL PROVISIONS AND ORDINANCE INVOLVED

The First Amendment and Section 1 of the Fourteenth Amendment to the United States Constitution are reprinted in the Appendix to this petition at 73a. Selected provisions of the Village of Octa's zoning and permit ordinance are reprinted at 74a-80a.

## STATEMENT OF THE CASE

Interstate seeks relief from the unconstitutional prior restraint imposed, under the purported authority of the Village of Octa's zoning and permit ordinance, against its reopening of an adult video arcade. The path that leads it to this Court is regrettably long and cumbersome. Even more regrettable, that path is littered with well established First Amendment principles, which the Ohio courts discarded along the way.

Interstate's business, the Interstate Adult Arcade, had been located near an interstate highway in the Village of Octa, since before 1992. As indicated by its name, the business was a video arcade where patrons could view adult videos on the premises. As indicated by its location -- in a village abutting an interstate highway -- its patrons, like those of all its neighboring businesses, were primarily travelers.

In the spring of 1992, the county prosecutor filed a complaint seeking to abate, under Ohio's nuisance law, alleged patron misconduct within the arcade's video booths. As part of the final judgment issued in that hotly contested litigation, the court ordered the arcade to be closed for one year commencing

July 15, 1992. Shortly after the closure order expired and the use of the premises was no longer prohibited, Interstate reopened its arcade and resumed the business of offering for view constitutionally protected videotapes.

Twelve days later, Interstate learned that the Village had passed a zoning and permit ordinance, while it had been closed. It learned this by the imposition of a prior restraint, which continues to date. For on that day, nearly five years ago, sheriff deputies served a temporary restraining order against Interstate's continued use of the premises. The order had issued, on an *ex parte* basis, at the request of the Village and its zoning inspector on the same day that the Village and Zoning Inspector had filed suit seeking not only the TRO but also preliminary and permanent injunctive relief against Interstate's operation of the arcade. The court ultimately granted the Village the requested injunctive relief as well. Appendix at 71a, 66a and 59a; temporary restraining order, preliminary injunction, and permanent injunction, respectively, issued in Incorporated Village of Octa v. The Interstate Adult Arcade, Case No. 930262 CVH, Fayette County Court of Common Pleas, affirmed in part, vacated in part, and reversed in part, CA94-04-002 (12th App. Dist. 1994).

Though the entire suit was predicated on Interstate's alleged failure to obtain a zoning certificate, the Village's intent to use the ordinance as a tool of censorship was apparent from the outset: the Zoning Inspector cited the content of the videos, which Interstate exhibited at the arcade, as a basis for the grant of the *ex parte* restraining order.

Interstate promptly responded. Its review of the Village's ordinance confirmed that the regulatory scheme was a lot like

those found constitutionally deficient in Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981) and Freedman v. Maryland, 380 U.S. 51 (1965). In the first instance, the Village required a licence, in the form of a zoning certificate, before a building could be put to use. (Zon. Ord. § 14.41 at 78a-79a). Like the zoning law under consideration in Schad, 452 U.S. at 64, moreover, the Village had divided its territory into various districts including commercial districts. In this regard, the Village's ordinance defines five different land-use districts: Agricultural, Residential, Commercial, Highway Service and Industrial. (Zon. Ord. § 5.0 at 74a.) Only three of the five established districts -- Agricultural, Residential and Highway Service -- however, are employed by the Village. Appendix at 43a, 44a, Incorporated Village of Octa v. Interstate Adult Arcade, Case No. CA94-04-002, (10/17/94) unreported opinion (12th App. Dist.).

In Schad, the zoning law directed that only permitted uses could exist as a matter of right; and, with respect to a commercial district, it listed the types of uses permitted. Id. So too, under the Village's ordinance, a use is prohibited unless it is expressly permitted. (Zon. Ord. § 6.01 at 74a-75a.) Permitted uses in the Agricultural district include "agricultural, including animal and poultry husbandry," single-family dwellings, churches, schools and non-commercial recreational facilities. (Zon. Ord. §§ 7.1-7.18 at 76a.) Permitted uses in the Residential district include single-family dwellings, schools and churches. (Zon. Ord. §§ 8.11-8.13 at 76a-77a.) And, permitted uses in the Highway Service District, which is the zoning district where the arcade is located, are "any retail business, service establishment or office serving primarily the highway traveler, such as hotels, motels, service stations, gift shops or restaurants." (Zon. Ord. § 10.11 at 77a.)

Similarly, like the regulatory scheme under consideration in Freedman, the Village's ordinance fails to define key terms, leaving unbridled discretion in enforcing authority, and fails to provide for prompt administrative decision-making or prompt judicial review.

For example, the ordinance leaves undefined the phrase serving primarily the highway traveler. Thus, it is left exclusively to the Zoning Inspector's discretion to determine if a business qualifies as a permitted use in the Highway Service District. And it is he who decides whether a requisite zoning certificate will be issued or denied. (Zon. Ord. § 14.41 at 78a-79a). Indeed, though the ordinance promises that a grant or denial will issue within 30 days, (Id.) it vests the Zoning Inspector with discretion, while providing no time limit, to decide when and if an application is complete and properly before him for review. (Zon. Ord. § 14.3 at 77a-78a.)

Further, while the Village's ordinance establishes an administrative review procedure under which an applicant may appeal the Zoning Inspector's adverse rulings to the Board of Zoning Appeals and the BZA's adverse rulings to the Court of Common Pleas, (Zon. Ord. §§ 15.22 and 15.23 at 79a-80a), those provisions do not prevent an appeal from lingering indefinitely before the hearing process begins, or once it begins, from being continued indefinitely into the future. Nor does chapter 2506 of the Ohio Revised Code, which authorizes appeals of the BZA's decisions to the Court of Common Pleas, provide any short, fixed period for a decision.

Accordingly, Interstate moved to dissolve the TRO; and at the same time, it filed its answer and counterclaim for declaratory judgment, preliminary injunction, permanent

injunction and for money damages, together with a lengthy brief in support of its motion for preliminary injunction. Through these filings Interstate copiously apprised the court of exactly why the Village's scheme could not be abided, and need not be abided by Interstate, under the precedent of this Court and particularly Freedman and its progeny. It also raised defenses under state law including that its proposed use was permitted, as a matter of right, in the highway service district. This interpretation seemed not only consistent with the language of the ordinance but also constitutionally required under Schad, 452 U.S. at 67-68, 71-72, which proscribed zone-outs of speech businesses.

More specifically, at each stage of the proceedings Interstate argued that the language of the ordinance -- i.e., its requirement for a grant of a license, in the form of a zoning certificate, before a building may be put to use, its broad grant of discretion to the Zoning Inspector, the vagueness of its language, and its failure to provide for prompt administrative actions or prompt judicial review -- established that it was constitutionally deficient, as a blatant prior restraint under this Court's precedent.

Interstate's arguments fell on deaf ears. After a hearing on Interstate's motion to dissolve the temporary restraining order and the parties' respective motions for preliminary injunction, the court rejected all of Interstate's constitutional and state law challenges and preliminarily enjoined it from operating any business at the premises. Preliminary Injunction at 66a-70a. At hearing and in its entry, the court specifically faulted Interstate for having failed to apply for a zoning certificate. Id. at 67a.

Following the hearing, Interstate took action addressing the court's voiced concerned; it applied to use its premises as an adult video arcade. The Zoning Inspector, however, refused to rule on the application; and, once the time period -- 30 days -- prescribed under the ordinance had elapsed, Interstate brought the matter to the court's attention by way of a motion to dissolve the preliminary injunction. A month later the Village filed its response, claiming that the application was not on a proper form. The next day the court set the case down for hearing on the Village's request for a permanent injunction.

At that hearing, three things were clearly established: 1) Interstate had applied for a zoning certificate; 2) the Zoning Inspector was not about to rule on Interstate's application because, in his view, it was not on a proper form; and 3) the Zoning Inspector was convinced that an adult video arcade was not a permitted use under the Village's zoning law. While reiterating all its previous arguments, Interstate argued that a permanent injunction should not issue because this record established that Interstate had made a good faith effort to comply with the zoning law, that the ordinance permitted the Zoning Inspector to indulge in unconstitutionally discretionary games, and that the Village fully intended and understood its ordinance to exclude Interstate's speech business from the Village's boundaries. And these circumstances presented the court with a clear choice: either Interstate's arcade was a principal permitted use in the highway service district or if the Zoning Inspector and Village were correct that it was not a permitted use, the Village had effectively zoned-out Interstate's speech business in direct contravention of this Court's precedent.

Nonetheless the trial court, again, rejected Interstate's constitutional and legal challenges, reiterating its earlier

rationale, finding that Interstate's application was a nullity and issuing a permanent injunction, some seven months after it first issued its temporary restraining order. Permanent Injunction at 59a-65a.

On appeal, Interstate again challenged the constitutionality of the zoning law, while arguing that the trial court had also erred in rejecting Interstate's other legal defenses. Incorporated Village of Octa v. Interstate Adult Arcade, Case No. CA94-04-002 (10/17/94) unreported opinion and entry at 43a-54a and (11/28/94) unreported entry at 55a-57a (12th App. Dist.).

On review, the appellate court summarized the salient facts of the litigation as follows:

> This case began its crawl through the judicial system on July 15, 1992 when the Fayette County Court of Common Pleas found that a nuisance existed at appellant's place of business because of lewd conduct that was occurring on the premises. The court issued a permanent injunction and ordered appellant's business closed for one year. This court affirmed that decision. Roszmann v. Lion's Den (1993), 89 Ohio App.3d 775.
>
> On November 13, 1992, Octa enacted a zoning ordinance establishing five districts: Agricultural, Residential, Highway Service, Commercial, and Industrial. Three of these districts are in use: Agricultural, Residential, and Highway Service. Appellant's business is located within the Highway Service district.

> On August 8, 1993, appellant reopened its business. On August 20, 1993, Octa filed a complaint against appellant for violating Octa's zoning ordinance. Along with the complaint, Octa filed a motion for a temporary restraining order and an affidavit supporting the motion for a temporary restraining order. In the affidavit, Chester Dean, Octa's Zoning Inspector, stated that appellant was violating the ordinance because appellant was "selling the viewing of obscene and pornographic materials within the Village of Octa" and because appellant had not applied for and did not have a zoning permit. In an *ex parte* order, the trial court granted Octa's motion for a temporary restraining order on August 20, 1993.
>
> On September 13, 1993, Dean received a letter from appellant explaining that it was an application for a zoning permit. Dean never acted on appellant's request because it was not filed on the forms Dean believed were necessary to properly apply for a zoning certificate.
>
> On October 18, 1993, the trial court granted a preliminary injunction prohibiting appellant from using its property in violation of the zoning ordinance. On March 22, 1994, the trial court permanently enjoined appellant from operating any business activity on its property in violation of Octa's zoning ordinance.

Incorporated Village of Octa, (10/17/94) unreported opinion at 44a. (Emphasis added).

Untroubled by the amount of time that had passed, i.e., 14 months since the arcade was first shut-down and 12 months since Interstate first applied for a zoning certificate, and untroubled by the fact that this continuing prior restraint was imposed at the behest of the enforcing authority and in keeping with the Village's interpretation of its law that an arcade was not a permitted use, the appellate court found that the Village's zoning law was constitutionally sound. Id. at 45a-47a, 51a-52a. Finding merit in Interstate's state law arguments, however, the appellate court vacated the trial court's TRO, preliminary injunction and permanent injunction. Id. (and judgment entry) at 51a-53a. In so doing, the appellate court expressly reversed the trial court's decision that Interstate had not properly applied for a zoning certificate and remanded the entire matter for administrative action.

Pointing out that the appellate court's opinion was contrary to this Court's precedent and, indeed, the Village's own interpretation of its zoning law, Interstate sought but was denied reconsideration. (55a-57a). Interstate's constitutional arguments were rebuffed again when the Ohio Supreme Court dismissed Interstate's appeal for lack of a substantial constitutional question. (58a.)

Prior to receiving the appellate court's opinion, Interstate again attempted to comply with the Village's zoning law by filing additional applications to use its premises as an adult video arcade and failing that approval the right to use the premises for other lawful purposes, i.e., a clothing and gift boutique or a restaurant. The BZA's forthcoming adverse ruling (31a-38a) confirmed Interstate's worst fears: the

enforcing authorities read the law to zone-out Interstate's speech business. Interstate appealed that administrative decision, on questions of law, to the trial court.

Once armed with the appellate court's opinion, Interstate pressed the Village for the grant of its September 13, 1993 application; but on October 24, 1994, the Zoning Inspector denied that application. On appeal to the BZA, Interstate urged that its use was a permitted one and that a contrary ruling would run afoul of the First Amendment as well as the appellate court's opinion. It also argued that the tardy denial (over a year after application) was contrary to the express language of the ordinance, which directed the automatic grant of an application upon a failure to rule within 30 days. The BZA affirmed the denial (39a-42a); and, that adverse ruling too was appealed, on questions of law, to the trial court.

On October 11, 1996, -- 18 to 19 months after the administrative appeals were perfected -- the trial court summarily affirmed both of the BZA's decisions. (28a-29a.)

Interstate timely appealed from the trial court's ruling to the court of appeals. Because the resulting system of prior restraint imposed by the Village failed to fit into any of the limited exceptions to the general rule against prior restraints and was, further, procedurally deficient, Interstate argued that the Village's interpretation and application of its ordinance violated free-speech guarantees. In support of its position, Interstate relied heavily on this Court's precedent and particularly its decisions in Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981), and Freedman v. Maryland, 380 U.S. 51 (1965).

More particularly, Interstate urged the appellate court to take heed of the long-standing principle that it is the enforcing authority, not the applicant who challenges a regulation on free-speech grounds, who must carry the burden about the constitutionality of the resulting prior restraint. Schad,452 U.S. at 68, 77; Freedman, 380 U.S. at 60: see also Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) ("any system of prior restraints of expression...bear[s] a heavy presumption against its constitutional validity.")

At the heart of Interstate's argument was the straight forward proposition that the First Amendment prohibits suppression of speech by way of zoning regulation. In this regard, Interstate stressed over and over again in its briefs and at oral argument that -- under an unbroken line of this Court's precedent -- if a community permits varied forms of commercial activity, it can not, constitutionally, ban speech-related businesses. Schad, 452 U.S. at 67-68, 71-72. See also, Young v. American Mini Theaters, 427 U.S. 50, 71 n.35 (1976) (the First Amendment prohibits "zoning regulations that have 'the effect of suppressing, or greatly restricting access to lawful speech.' "); City of Renton v. Playtime Theater, Inc., 475 U.S. 41, 53-55 (1986) (if a zoning ordinance is to be enforced to restrict land use by speech-related businesses such as adult theaters, the zoning ordinance must allow "for reasonable alternative avenues of communication.")

Interstate also pointed out that it was equally well established that a zoning and permit law that confers standardless discretion on public officials must be stricken as constitutionally infirm. Freedman v. Maryland, 380 U.S. 51 (1965); Lovell v. Griffin, 303 U.S. 444 (1938); City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988).

This result, Interstate urged, was mandated by two principles. First, as this Court observed in FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 225-226 (1990): "[A licensing] scheme that 'places unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship'." See also, City of Lakewood, 486 U.S. at 757; Shuttlesworth v. Birmingham, 394 U.S. 147 (1969). Second, the absence of objective standards to provide a guidepost for official action renders it impossible to ascertain whether the licensor is discriminating against speech because of its content or for some other reason. "Without these guideposts, post hoc rationalizations by the licensing official and the use of shifting and illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is ... suppressing unfavorable expression." City of Lakewood, 486 U.S. at 758 (citation omitted).

Moreover, Interstate argued that under this Court's precedent, the Village's zoning and permit law must, at a minimum, provide a short fixed time period for the approval or denial of a zoning certificate and for prompt judicial review in the event of a denial, if it were to pass constitutional muster. Freedman, 380 U.S. 51 at 58-60.

In painstaking detail, Interstate explained to the appellate court exactly why the Village's ordinance was an unjustified and unjustifiable prior restraint, violating all of this constitutional precedent. The Village had but three active zoning districts: Residential, Agricultural and Highway Service. The arcade clearly did not qualify as a residential or agricultural use. (See §§ 7.1-7.18, 8.11-8.13 at 76a-77a). And if, as the enforcing authorities maintained, it also failed to qualify as a retail or

service establishment that was permitted in the Highway Service District, then there was absolutely nowhere in the Village where the arcade could locate under the ordinance's proscriptions.

Thus, Interstate urged, the Village had effected not merely a substantial restriction on speech, but a total restriction on speech, in direct contravention of the teachings of Schad, Young and Renton.

Likewise, Interstate noted for the appellate court how the ordinance ran afoul of the requirements of Freedman by failing to set forth guidelines to instruct the Zoning Inspector on when he may grant or deny a particular application. In this regard, Intestate emphasized that the ordinance did not require the inspector to act in a purely ministerial way and grant an application if certain criteria are met. Rather, the ordinance allowed the inspector to decide if and when an application was complete and whether "other information [was] necessary" to render that application complete. (§ 14.3, Zon. Ord. at 77a-78a.) And, Interstate also pointed out that the ordinance left to the inspector's discretion to determine if a use was a "retail business" that "primarily serves the highway traveler." (§ 10.11, Zon. Ord. at 77a.)

Indeed, Interstate argued that in this case the Zoning Inspector and the BZA exercised discretion to delay and ultimately thwart the grant of the requested zoning certificate. Thus, while the ordinance prescribed that an application shall be approved or denied within thirty days, the uncontroverted fact remained that the initial denial of Interstate's first application occurred over one year after the application was made because the Zoning Inspector refused to rule until ordered to do so by the appellate court. And, in so doing, the Zoning

Inspector and the BZA wholly avoided their duty to grant the certificate under the ordinance's provision for an automatic grant in cases, such as this one, where the Zoning Inspector had failed to act within the prescribed time period. (§ 14.41, Zon. Ord. at 78a-79a.)

Further, as argued to the appellate court, this same type of constitutional abuse tainted the Zoning Inspector's and BZA's determinations as to what uses were permitted in a certain district. Specifically, they found a tool of censorship in their application of § 10.11, which sets forth the types of commercial uses permitted in a Highway Service District. (77a.) Undeniably an adult video arcade was not expressly excluded as a permitted use but rather fell easily within the breadth of the ordinance's language. Nonetheless, the Zoning Inspector and BZA utilized discretion to prohibit the use. This interpretation, Interstate argued, was contrary to the plain language of the ordinance and the dictates of the First Amendment, as set forth in Schad, Young, and Renton. And the adoption and application of that nonsensical and unconstitutional interpretation by the enforcing authorities demonstrated that the ordinance vested too much discretion in them to survive scrutiny under Freedman and its progeny.

Under these circumstances, Interstate urged the appellate court to conclude that the enforcement of the Village's ordinance could not be reconciled with longstanding First Amendment principles, which demand that governmental discretion be limited and circumscribed in connection with the regulation of speech-related businesses.

Moreover, Interstate explained why the circumstances of this case led to the inescapable conclusion that in practice the

ordinance provided neither a short fixed period for administrative action nor for prompt judicial review of the administrative action. For example, Interstate pointed out that the 30-day time requirement set forth in § 14.41 (78a-79a) had proven to permit lengthy delay at the discretion of misdirected censors. For, though Interstate applied for a certificate on September 13, 1993 the Zoning Inspector avoided ruling on the application for over one year until October 24, 1994; it took more than another two months for the BZA to affirm that ensuing tardy denial of the application; and it took the trial court another year and a half to decide Interstate's administrative appeal.

Thus, Interstate argued, the Village had failed to meet its constitutional obligation, under Freedman, to provide a procedure that was sensitive to the First Amendment and that ensured speedy judicial review of adverse administrative determinations.

On October 20, 1997, the appellate court issued a lengthy opinion overruling Interstate's assignments of error and finding the Village's zoning and permit ordinance, as interpreted and applied, entirely constitutional under the First Amendment. (1a-20a, 21a, 25a.) It did so without even citing Schad, the case that Interstate had urged, time and time again, was outcome determinative.

Because the appellate court's opinion failed to mention Schad, let alone distinguish or harmonize that decision, Interstate requested the appellate court to reconsider. It denied Interstate's request on November 20, 1997, finding its

original opinion to be entirely consistent with this Court's decision in Schad. (23a-24a.)

Though Interstate filed a memorandum in support of jurisdiction setting forth propositions of law and explaining exactly how the appellate court's opinion departed from this Court's teachings in Schad and Freedman, (27a), the Ohio Supreme Court on February 18, 1998 summarily dismissed Interstate's appeal for lack of a substantial constitutional question. (26a.)

## REASONS FOR GRANTING THE WRIT

The appellate court's, and by abdication the Ohio Supreme Court's, affirmance of the result achieved here -- an unjustified prior restraint of nearly five years duration -- represents an assault of monumental proportions upon principles clearly and unmistakably announced by a long and unbroken line of this Court's decisions beginning with Freedman and spanning Schad, City of Lakewood, FW/PBS, Inc., Young and Renton.

Indeed, all of the evils identified by this Court as the reasons for the First Amendment principles explicated in those decisions permeate the record in this case. In short, the state courts below have "... decided an important federal question in a way that [so pervasively and completely] conflicts with relevant decisions of this Court" as to present a compelling reason for the grant of a writ of certiorari. Supreme Court Rule 10(c).

## CONCLUSION

For these reasons, Interstate's petition for a writ of certiorari should be granted.

Respectfully submitted,

J. MICHAEL MURRAY
(Counsel of Record)
BERKMAN, GORDON, MURRAY & DeVAN
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113-1949
(216) 781-5245

Attorneys for Petitioner

Of Counsel:
JEREMY A. ROSENBAUM
BERKMAN, GORDON, MURRAY
& DeVAN

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

FAYETTE COUNTY

| | | |
|---|---|---|
| INTERSTATE INDEPENDENT CORPORATION, | : | |
| | : | CASE NO. CA96-11-026 |
| Appellant, | | CA96-11-027 |
| | : | |
| -vs- | | OPINION |
| | : | |
| THE BOARD OF ZONING APPEALS FOR FAYETTE COUNTY AND THE VILLAGE OF OCTA, | : | 10/20/97 |
| | : | (Filed Oct. 20, 1997) |
| Appellee. | : | |

Berkman, Gordon, Murray & DeVan, J. Michael Murray, Jeremy A. Rosenbaum, 2121 The Illuminating Building, 55 Public Square, Cleveland, Ohio 44113-1949, for appellant

Steven H. Eckstein, Fayette County Prosecuting Attorney, 214 W. Market Street, Washington C.H., Ohio 43160, for appellee

**Young, P.J.** This appeal arises from the attempts of appellant, Interstate Independent Corporation ("Interstate"), to get zoning approval to operate an "adult video arcade" or, alternatively, a "retail clothing and gift boutique" on its property

located in the Village of Octa ("Octa"). Interstate complains that the administrative decisions denying such approval were arbitrary and capricious. Interstate also argues that the administrative authorities applied the Octa zoning ordinance unconstitutionally, and that the Fayette County Court of Common Pleas erred in ruling on the merits of the administrative appeal without a complete record.

## I. BACKGROUND

Between January and March of 1992, undercover officers with the Fayette County Sheriff's Department and the South Central Ohio Task Force investigated the adult video arcade Interstate operated at 9017 West Lancaster Road in Octa. The arcade contained thirty-two viewing booths, each equipped with a bench, a menu of sexually explicit videos, and a coin-operated video monitor. During the investigation, officers collected samples of semen and pubic hair from various viewing booths. Officers also observed what appeared to be dry semen stains on the walls, floors, and video monitors. Officers described the presence of employees who swept and mopped the floors and collected used paper towels and tissues from the video booths and adjoining hallway.

Based upon the evidence of lewd conduct occurring on the premises, the Fayette County Court of Common Pleas determined that Interstate's adult video arcade was a public nuisance. On July 15, 1992, the common please court issued a permanent injunction, ordered Interstate's business closed for one year, and ordered all property used in conducting the nuisance sold. This court subsequently affirmed that decision. Roszmann v. Lions Den (1993), 89 Ohio App.3d 775, jurisdictional motion overruled, 68 Ohio St.3d 1420.

On November 13, 1992, Octa adopted a comprehensive zoning plan. Octa's zoning ordinance established five districts: agricultural, residential, highway service, commercial, and industrial. The agricultural, residential, and highway service districts are currently in use. Interstate's property, which is located just west of U.S. I-75, is within a highway service district. The Octa zoning ordinance defines a permitted use in the highway service district as "any retail business, service establishment or office serving primarily the highway traveler, such as hotels, motels, service stations, gift shops or restaurants." Octa Zoning Ordinance Section 10.11. The zoning ordinance, however, does not purport to regulate adult entertainment.

On August 8, 1993, just over one year after the common pleas court ordered the arcade closed, Interstate reopened its adult video arcade.[1] On August 20, 1993, Octa filed a complaint to enjoin Interstate for violating its zoning ordinance, and the Fayette County Common Pleas Court issued a preliminary injunction. On September 13, 1993, Interstate sent the Fayette County Zoning Inspector, the official responsible for enforcing Octa's zoning ordinance, a letter requesting a zoning permit. The zoning inspector, however, did not immediately act on that letter because he did not believe that Interstate filed the request on a necessary form.

On March 22, 1994, the common pleas court permanently enjoined Interstate from violating Octa's zoning ordinance was unconstitutional on its face. Interstate also challenged the zoning inspector's refusal to act upon its letter requesting a

---

[1] Interstate apparently purchased most or all of the property that the court had ordered sold at auction.

zoning permit. This court concluded that the zoning resolution was constitutional, but ordered the zoning inspector to act upon Interstate's request for a zoning permit. Incorporated Village of Octa v. Interstate Adult Arcade (Oct. 17, 1994), Fayette App. No. CA94-04-002, unreported, jurisdictional motion overruled and discretionary appeal not allowed, 71 Ohio St.3d 1491.

While Interstate's permanent injunction appeal was pending in this court, Interstate filed additional requests for zoning approval with the zoning inspector. The zoning inspector timely considered each request, but consistently denied Interstate permission to use its property as either an adult video arcade or as a retail clothing and gift boutique.[2] The zoning inspector did approve an Interstate application to operate a restaurant on the property.

Interstate appealed the zoning inspector's adverse determinations to the Fayette County Board of Zoning Appeals (the "Board"). Interstate asked the Board to independently consider its applications for conditional use certificates to operate either an adult video arcade or a retail clothing and gift boutique. The Board held a hearing on August 3, 1994. It subsequently affirmed the zoning inspector's conclusion that Interstate's proposed uses were not "primary permitted uses" within Octa's highway service district. The Board also denied

---

[2] On April 13, 1994, Interstate applied for a zoning certificate to use its property as an adult video arcade. The zoning inspector denied that application on May 3. On May 12, Interstate applied for a conditional use permit to use its property as a clothing and gift boutique. The zoning inspector denied that application on June 6, 1994. On June 22, 1994, Interstate applied for a conditional use permit to use its property as an adult video arcade and as a retail clothing and gift shop. The zoning inspector denied that application as well.

Interstate's requests for conditional use certificates. Interstate appealed the Board's decision to the Fayette County Court of Common Pleas, Case No. 940284CVH.

As noted above, on October 17, 1994, this court ordered the zoning inspector to act on Interstate's September 13, 1993, letter requesting a zoning permit. This court was unaware that the zoning inspector and the Board had timely considered Interstate's subsequent requests for zoning approval. On October 24, 1994, within seven days of this court's decision, the zoning inspector considered Interstate's letter seeking zoning approval, but again refused to issue a zoning permit. After a hearing on December 6, 1994, the Board again affirmed the zoning inspector's decision. Interstate also appealed that decision to the common pleas court in case number 950013CVH.

The common pleas court consolidated Interstate's two administrative appeals. On October 11, 1996, the court affirmed the Board. The court concluded that the Board's decisions were reasonable and supported by substantial and reliable evidence. Interstate timely appealed that decision to this court.

## II. DISCUSSION

### A. First Assignment of Error

Under its first of three assignments of error, Interstate complains that the Board's decisions were contrary to law and unsupported by a preponderance of substantial, reliable, and probative evidence. Interstate sets forth four separate issues for review.

Interstate first argues that it is entitled to a conditional use

permit to operate is adult video arcade as a "grandfathered" or prior nonconforming use. This court disagrees.

R.C. 303.19 provides for the continuation, under certain circumstances, of nonconforming uses in existence before the adoption of zoning:

> The lawful use of any dwelling, building, or structure and of any land or premises, as existing and lawful at the time of enactment of a zoning resolution or amendment thereto, may be continued, although such use does not conform with the provisions of such resolution or amendment, but if any such nonconforming use is voluntarily discontinued for two years or more, any future use of land shall be in conformity with sections 303.01 to 303.25, inclusive, of the Revised Code.

(Emphasis added.)[3]

Interstate argues that its adult video arcade is a valid nonconforming use since it began operating the arcade before Octa adopted its zoning ordinance and never voluntarily ceased operations for more than two years. Appellee, on the other hand, argues that the adult video arcade did not exist as a lawful use when Octa adopted its zoning ordinance.

---

[3] Section 6.032 of Octa's zoning ordinance provides that "[n]o building, structure or premises of a nonconforming use which has ceased for two (2) years or more shall again be put to a conforming use."

R.C. 303.19 addresses two separate and distinct issues: (1) the existence of a lawful use at the time a change in zoning occurs, and (2) discontinuation of a nonconforming use which occurs after a change in zoning." Booghier v. Wolfe (1990), 67 Ohio App.3d 467, 470, jurisdictional motion overruled, 55 Ohio St.3d 708 (emphasis in original). The Booghier case involved a complaint for an injunction against an "adult entertainment establishment" in Crystal Lakes, Ohio. In December 1985, that establishment was closed as a nuisance for one year based upon prostitution on the premises. In May 1987, zoning jurisdiction in Crystal Lakes was incorporated with Clark County; the parties agreed that the county's zoning regulations prohibited adult entertainment unless that use exited as a valid nonconforming use. In late October 1987, after zoning change but shortly before the two-year anniversary of the closing, the establishment attempted to reopen. The common pleas court, however, found that the owner "did not have a valid non-conforming use at the time of the incorporation of Clark County zoning jurisdiction."

On appeal, the Second District Court of Appeals rejected the appellant's argument that its business was a grandfathered use:

> Under R.C. 303.19, the use that is "grandfathered" upon a change in zoning is only that use that was 'existing and lawful' as of the date the zoning was changed. Here, the trial court found, and we think properly so, that use of the premises as an adult entertainment business did not exist when the zoning was changed, or that such use, as did exist or as was

contemplated, was not lawful.

Id. at 473, (citations omitted, emphasis in original). There were two separate concurring opinions in Booghier. Both concurring opinions agreed that the establishment was not entitled to nonconforming use status because the prior use was unlawful. Id. at 474. Both concurring opinions cited Matthews v. Pernell (1990), 64 Ohio App.3d 707 (massage parlor shut down as nuisance for prostitution did not qualify as prior nonconforming use).

The reasoning in Booghier is persuasive. The court, however, concludes that the issue is not whether Interstate's adult video arcade was "in existence" when Octa adopted its zoning ordinance. Instead, the question is whether Interstate's adult video arcade existed as a "lawful" use at that time. See Booghier at 474 (Fain, J., concurring).

The operation of an adult video arcade cannot be considered an unlawful use of property per se. See, e.g., Joseph Burstyn, Inc. v. Wilson (1952), 343 U.S. 495, 72 S.Ct. 777 (First Amendment protects motion pictures as fully as other mediums of expression). This court, however, was previously concluded that Interstate operated its adult video arcade unlawfully. Roszmann, 89 Ohio App.3d at 784. See, also, State ex rel. Rear Door Bookstore v. Tenth Dist. Court of Appeals (1992), 63 Ohio St.3d 354, 362 (sexual activity resulting in sanctions did not involve First Amendment freedoms of speech or activity). In considering whether a valid nonconforming use exists, a prior "determination of illegality is binding on appellants and their business activity in any substantially similar form." Matthews, 64 Ohio App.3d at 713. Moreover, this court need not ignore the unlawful nature of Interstate's operation simply because

other aspects of its business involved "expressive material." See Arcara v. Cloud Books, Inc. (1986), 478 U.S. 697, 705, 106 S.Ct. 3172, 3176-77 ("First Amendment values may not be invoked by merely linking the words 'sex' and 'books'").

This court concludes that Interstate's adult video arcade did not exist as a lawful use when the village adopted its zoning ordinance. Therefore, Interstate's adult video arcade was not a valid nonconforming use, and it was not entitled to a conditional use permit under R.C. 303.19.

Interstate next argues that an adult video arcade and a retail clothing and gift boutique are both "primary permitted uses" in Octa's highway service district. Section 10.11 of Octa's zoning ordinance defines a permitted use in the highway service district as "any retail business, service establishment or office serving primarily the highway traveler, such as hotels, motels, service stations, gift shops or restaurants." (Emphasis added). Obviously, this definition does not specifically list either an "adult video arcade" or a 'retail clothing and gift boutique." The issue, therefore, is whether Interstate's proposed uses are sufficiently similar to the examples in the definition to constitute primary permitted uses.

Octa's zoning ordinance authorizes the Fayette County zoning authorities to enforce its provisions. Octa Zoning Ordinance Section 14.1. To properly enforce the ordinance, the zoning authorities must necessarily interpret its provisions. In determining if uses not specifically mentioned in a zoning ordinance are similar to uses expressly listed, the zoning authorities must act in the exercise of their police power, and their determinations must be reasonable. See Rotellini v. West Carrollton Bd. Of Zoning Appeals (1989), 64 Ohio App.3d 17,

24.

On review, however, the common pleas court must presume that an administrative interpretation or determination is reasonable and valid. Id. at 20. The party opposing that determination has the burden of demonstrating any such determination is invalid. Id. Thus, the administrative determination here that neither an adult video arcade nor a clothing and gift boutique is a primary permitted use is presumptively reasonable, and Interstate had the burden to rebut that presumption.

Several individuals at the Board hearing expressed concern that neither an adult video arcade nor a retail clothing and gift boutique would primarily serve the highway traveler. See Octa Zoning Ordinance Section 10.11. Significantly, there was some evidence at the August 3 hearing that the zoning inspector had previously and consistently held that retail clothing stores in areas adjacent to Octa were also not primary permitted uses in a highway service district. Interstate, however, never introduced any evidence that its proposed uses were directed toward the service of the highway traveler. See Id. Interstate also did not point to any instances where the zoning authorities interpreted the definition of permitted uses in the highway service district inconsistently. Under these circumstances, Interstate did not carry its burden of showing that the Board's interpretation of the zoning ordinance was unreasonable.

Interstate next argues that no substantial evidence supported the Board's denial of its conditional use applications. This court disagrees. A decision to deny an application for a conditional se permit is administrative in nature. Community Concerned Citizens, Inc. v. Union Twp. Bd. Of Zoning Appeals

(1993), 66 Ohio St.3d 452, 455-46. In reviewing that decision, the common pleas court must weigh the evidence in the record to determine whether there is a preponderance of reliable, probative, and substantial evidence in support. Id. The common pleas court, however, should not substitute its judgment for that of the board. Id.

The orderly development of an area is a legitimate goal of zoning regulations, and the burden of land use restrictions should be weighed against the proposed long-range development plan for the area as a whole. Miller Chevrolet, Inc. v. Willoughby Hills (1974), 38 Ohio St.2d 298, 303. In ruling on Interstate's conditional use applications, the Board was required to consider the nature and condition of all adjacent uses and structures. Octa Zoning Ordinance Section 15.31. Octa's ordinance also provides the Board with authority to impose additional requirements and conditions on conditional uses it considers. Id.

Laurence Dumford, a former county commissioner, testified at the August 3 hearing about the economic importance of the highway corridor to Octa. Considering the significant economic impact of the highway service district to the entire community, Dumford stressed the need to carefully consider the use of land abutting the highway. Many individuals at both hearings before the Board complained that Interstate's business had greatly deterred economic development in the immediate area. Interstate, however, never challenged or rebutted that evidence. Significantly, although board members consistently asked Interstate's representative for more detailed information about the proposed uses for its property, no such information was forthcoming.

This court concludes that a preponderance of reliable,

probative, and substantial evidence supports the Board's decisions not to grant Interstate's applications for conditional use permits. Moreover, without Interstate's cooperation in providing information about its proposed uses for its property, the Board could not properly consider the requests for conditional use permits.

In its last issue under the first assignment of error, Interstate complains it is entitled to a zoning certificate under Section 14.41 of Octa's zoning ordinance. Section 14.41 provides in part that the zoning inspector must act upon all "authorized applications" within thirty days of filing, and must either issue a zoning certificate within that time or notify the applicant of the reasons for a refusal. Section 14.41 also provides that failure to notify the applicant of a refusal of an application within the thirty-day period entitles the applicant to a zoning certificate.

As noted above, Interstate sent the zoning inspector a letter in September 1993 asking for zoning approval. The zoning inspector, however, did not immediately act upon Interstate's request because it was not filed on an official form. This court later determined that Interstate's letter satisfied all necessary requirements to serve as an "authorized application" for a zoning certificate. Octa at 9. This court therefore ordered the zoning inspector to act upon the request. Id. at 13.

Considering this court's previous ruling in Octa, this court concludes that the zoning inspector had thirty days from the date of this court's order to consider Interstate's request for zoning approval. The zoning inspector complied with this court's order within seven days. If this court had concluded that the zoning inspector had violated section 14.41, this court

would not have remanded the issue. Interstate is not entitled to a zoning certificate under Octa Zoning Ordinance Section 14.41.

To summarize the first assignment of error, Interstate's adult video arcade did not exist as a lawful use when Octa adopted its zoning ordinance, and the business was not, therefore, a "grandfathered" or valid nonconforming use. Additionally, Interstate did not rebut the administrative determination that neither an adult video arcade nor a retail clothing and gift boutique are primary permitted uses within Octa's highway service district. Interstate also failed to show that the Board acted unreasonably in denying its applications for conditional use permits. Finally, Interstate was not entitled to a zoning permit for the zoning inspector's failure to immediately act on its September 13 letter requesting zoning approval. Interstate's first assignment of error is overruled.

B. Second Assignment of Error

Under its second assignment of error, Interstate complains that the administrative authorities applied Octa's zoning ordinance unconstitutionally. Interstate specifically argues that the zoning inspector and the Board applied the zoning ordinance as an unconstitutional prior restraint on 'protected expression." Interstate also argues that application of the ordinance completely denies it the opportunity to operate its "speech-related" business in Octa.

Interstate previously challenged the facial constitutionality of Octa's zoning ordinance. This court concluded, however, that the ordinance was constitutional. Octa at 4. This court held that the ordinance contains neutral criteria with which to decide if an applicant may receive a zoning permit, and ensures a solid

foundation for judicial review.[4] Id. at 5, citing Lakewood. This court also rejected Interstate's argument that the ordinance did not provide for prompt judicial review. Id. at 6.

Interstate raises nearly identical constitutional argument in this appeal, but instead of attacking the ordinance on its face, Interstate's now challenges the ordinance as applied. Contrary to appellee's assertion, the doctrine of collateral estoppel does not bar Interstate's present constitutional challenge. Officials charged with interpreting and enforcing a valid zoning regulation may nevertheless attempt to apply that regulation unlawfully. See Lakewood v. Plain Dealer Pub. Co. (1988), 486 U.S. 750, 760-61, 108 S.Ct. 2138, 2146 (although laws of general application are "too blunt a censorship instrument to warrant judicial intervention before an allegation of actual misuse," if the charge is made, courts may compare a "speech-related decision" to decisions unrelated to speech).

There is no question that Octa has the authority to zone and control land use within its boundaries in accordance with its zoning ordinance. See Gibson v. Oberlin (1960), 171 Ohio St. 1, 5. Additionally, a law requiring permits for specified activities is not unconstitutional because it vests discretion in administrative officials to grant or deny the permit, and the Constitution does not require courts to assume that such officials will illegally exercise their discretion. See Douglas v. Noble (1923), 261 U.S. 165, 170, 43 S.Ct. 303, 305. Moreover,

---

[4] This court noted that the zoning ordinance contains specific criteria for determining permissible uses in each of the five designated districts, and that the ordinance also contains specific criteria for the size, shape, capacity, location and other specifications as to buildings in Octa. Octa at 6. This court concluded that the requisite criteria are clearly established in the ordinance and are content-neutral. Id.

the Supreme Court has held that the enforcement of an ordinance of general application does not necessarily implicate the First Amendment, although enforcement may have "incidental consequences" on First Amendment protected activities. See Arcara at 705-706, 106 S.Ct. at 3177. Although a law or policy allowing communication in a certain manner for some activities but not for others raises the specter of content and viewpoint censorship, "law of general application that are not aimed at conduct commonly associated with expression and do not permit licensing determinations to be made on the basis of ongoing expression or the words about to be spoken, carry with them little danger of censorship." Lakewood at 760-63, 108 S.Ct. at 2146-47.

In light of the foregoing principles, it is incumbent upon the party challenging the application of a generally applicable zoning ordinance to come forward with some evidence that a particular administrative decision is based upon an unlawful purpose, or that any incidental consequences on First Amendment related activities are unreasonable. Octa's zoning ordinance is a law of general application. Unlike many zoning ordinances in force throughout the nation, the ordinance here does not purport to regulate adult businesses, and does not regulate any form of conduct, speech, or expression. Compare Renton v. Playtime Theatres, Inc. (1986), 475 U.S. 41, 106 S.Ct. 925 (city may regulate location of adult businesses within a comprehensive zoning scheme as long as the regulations are designed to serve a substantial governmental interest and do not unreasonably limit alternate avenues of communications). See, also, Young v. American Mini Theatres, Inc. (1976), 427 U.S.

50, 96 S.Ct. 2440.[5] Thus, Interstate had burden of establishing that the administrative authorities applied the zoning ordinance unreasonably or as an attempt to control or limit Interstate's First amendment rights.

There is no indication here that Octa adopted its comprehensive zoning scheme to restrain Interstate's First Amendment rights. Moreover, the Board did not expressly base its administrative decisions here upon the content of Interstate's expressive activities.[6] Instead, the Board premised its decisions on Interstate's failure to demonstrate that its proposed uses were directed primarily toward the highway traveler. The Board was also concerned with Interstate's refusal to provide it with any meaningful information about its proposed uses.

Each of Interstate's current constitutional arguments, however, is premised on its presumption that the Board applied the zoning resolution to prohibit or restrain its First Amendment protected right to expression, or that any incidental consequences on Interstate's first amendment rights were unreasonable. Interstate, however, is not entitled to a presumption that the administrative authorities acted arbitrarily

---

[5] As far as businesses purveying sexually explicit materials are concerned, zoning ordinances designed to combat the undesirable secondary effects associated with those businesses must be reviewed under the standards applicable to "content-neutral" time, place, and manner regulations. The appropriate inquiry in such cases is whether the ordinance at issue is designed to serve a substantial government interest and allow for reasonable alternative avenues of communication. Renton at 50, 106 S.Ct. at 930.

[6] Interstate presented no evidence that its proposed use of its property for a retail clothing and gift boutique would involve expressive material presumptively protected by the First Amendment.

or unlawfully. See Douglas at 170, 43 S.Ct. at 305. Interstate is also not entitled to a presumption that an incidental consequences on its ability to operate its "expressive activities" are unreasonable. Instead, Interstate had the responsibility to produce some evidence on those issues. For example, Interstate could have compared the Board's actions here with Board decisions in other cases involving "non-expressive" businesses. Interstate, however, made no such attempt to show that the Board's decisions were arbitrary, or motivated by an intent to prohibit presumptively protected speech.

Interstate also complains that the zoning ordinance is unconstitutional as applied because it alleges that Octa's zoning scheme precludes Interstate from operating its business in Octa. See Renton at 54, 106 U.S. at 932 (the First Amendment does not prohibit content neutral regulation of adult theater, but city may not deny that business a reasonable opportunity to operate within the city). Interstate points out that there were only three active zoning districts in use when it applied for its zoning permits. Interstate assumes that the administrative authorities would not have approved its proposed uses in Octa's agricultural or residential districts.

The basic issue here is whether the administrative authorities have applied the zoning ordinance to prohibit an entire category of presumptively protected expression in Octa. Interstate, however, has again failed to make its case. Interstate has never tried to petition for a zoning change to one of the categories not presently in use in Octa. Moreover, Interstate introduced no evidence that the administrative authorities were likely to prohibit it from distributing its expressive material in another district. It is also not clear that the Board would have denied Interstate's applications for conditional use permits if

Interstate had cooperated with the Board by providing it with information about its proposed uses. This court concludes that Interstate has not established that the administrative authorities have applied Octa's zoning ordinance to deny Interstate any reasonable opportunity to open and operate its adult business within Octa. See Renton.

To summarize this second assignment of error, Interstate has failed to establish that the administrative authorities applied Octa's zoning ordinance unconstitutionally. Interstate produced no evidence that the Board applied the zoning ordinance to impose a prior restraint on its right to free speech. Moreover, Interstate did not establish that the zoning ordinance unreasonably precludes it from participating in free expression in Octa. Interstate's second assignment of error is overruled.

### C. Third Assignment of Error

Interstate contends under its third assignment of error that the common pleas court erred in ruling on the merits of its administrative appeals. Interstate complains that the Board did not file a complete record of the administrative proceedings with the common pleas court. It argues that the common pleas court erred in affirming the Board's decision without a hearing, without making specific conclusions of law, and without citation to authority.

The record contains detailed minutes of the two hearings before the Board. Appellee also filed a verbatim transcript of the August 3, 1994 hearing.[7] On March 23, 1995, Interstate

---

[7] Although that transcript was timely filed on January 25, 1995, the Fayette County Clerk of Courts initially misfiled that transcript. The

filed a motion to show cause why its appeal should not be granted based upon appellee's alleged failure to provide the common pleas court with a complete record of the proceedings. Interstate, however, made no attempt to describe the deficiencies it perceived in the record. Interstate also made no attempt to introduce additional evidence to the common pleas court under R.C. 2506.03.

R.C. 2506.02 provides, in part, that the officer or body from which an administrative appeal is taken shall prepare and file with the common pleas court "a complete transcript of all the original papers, testimony, and evidence offered, heard, and taken into consideration in issuing the final order, adjudication, or decision appealed from" within forty days after filing the notice of appeal. R.C. 2506.03(A) provides, in part, that the administrative appeal in the common pleas court will be confined to the transcript as filed pursuant to R.C. 2506.02 unless one of five circumstances applies. For example, one such circumstance occurs when the transcript does not contain a report of all evidence admitted or proffered by the appellant. R.C. 2506.03(A)(1). Another circumstance occurs if the administrative authority fails to file conclusions of fact supporting the final decision appealed from. R.C. 2506.03(A)(5). If any one of the five circumstances apply, the common pleas court may consider "additional evidence as may be introduced by any party." R.C. 2506.03(A).

Although Interstate complained that the record was incomplete, Interstate made no attempt to identify the

---

clerk did not correct that mistake until December 9, 1996, after the common pleas court affirmed the Board's decisions. The minutes of the hearing are very detailed, however, and accurately reflect the verbatim transcript.

deficiencies it perceived in the record. More importantly, Interstate made no attempt to introduce additional evidence to the trial court pursuant to R.C. 2506.03. If Interstate was dissatisfied with the state of the record before the common pleas court, it should have taken steps to supplement the record. See R.C. 2506.03. Moreover, the minutes of both administrative hearings and the verbatim transcript of the August 3, 1994, hearing indicate that Interstate made no attempt to introduce any evidence at that administrative hearings before the Board. Under these circumstances, the trial court did not err in ruling on the merits of Interstate's administrative appeal. Interstate's third assignment of error is overruled.

Judgment affirmed.

KOEHLER AND WALSH, JJ., concur.

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

FAYETTE COUNTY

| | | |
|---|---|---|
| INTERSTATE INDEPENDENT CORPORATION, | : | |
| | : | CASE NO. CA96-11-026 |
| Appellant, | | CA96-11-027 |
| | : | |
| -vs- | | JUDGMENT ENTRY |
| | : | |
| THE BOARD OF ZONING APPEALS FOR FAYETTE COUNTY AND THE VILLAGE OF OCTA, | : | (Filed Oct. 20, 1997) |
| Appellee. | : | |

The assignments of error properly before this court having been ruled upon as heretofore set forth, it is the order of this court that the judgment or final order herein appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Fayette County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.

/s/ William W. Young
William W. Young, Presiding Judge

/s/ Richard N. Koehler
Richard N. Koehler, Judge

/s/ James E. Walsh,
James E. Walsh, Judge

IN THE COURT OF APPEALS OF FAYETTE COUNTY, OHIO

| | | |
|---|---|---|
| INTERSTATE INDEPENDENT CORPORATION, | : | |
| | : | CASE NO. CA96-11-026 |
| Appellant, | : | |
| -vs- | | ENTRY |
| | : | |
| THE BOARD OF ZONING APPEALS FOR FAYETTE COUNTY AND THE VILLAGE OF OCTA, | : | (Filed Nov. 20, 1997) |
| Appellee. | : | |

The above cause is before the court pursuant to an application for reconsideration filed by counsel for appellant, Interstate Independent Corporation, on October 30, 1997. In its application, Interstate Independent Corporation asserts that this court did not properly consider Schad v. Borough of Mount Ephraim (1981), 452 U.S. 61, 101 S.Ct. 2176, when it overruled Interstate's second assignment of error.

An application for reconsideration may be granted only when the movant points to an obvious error in the court's decision, or raises an issue for consideration which was either not considered at all or not fully considered when it should have been. Columbus v. Hodge (1987), 37 Ohio App.3d 68.

The Schad decision involved an ordinance that had been construed by New Jersey court's to provide that "live entertainment," including nude dancing, is "not a permitted use

in any establishment" in the borough of Mount Ephraim. Id. at 65, 101 S.Ct. at 2181. The supreme court concluded that Mount Ephraim had "not adequately justified its substantial restriction of protected activity." Id. at 72, 101 S.Ct. at 2184.

In this case, the zoning ordinance at issue is content neutral. Moreover, this court concluded that there was no evidence to support Interstate's allegation that zoning authorities applied Octa's zoning ordinance to restrain protected expression. The court therefore finds that its disposition of Interstate's second assignment of error is not, as Interstate asserts, "directly at odds with Schad."

Based upon the foregoing, Interstate's application for reconsideration is hereby DENIED.

IT IS SO ORDERED.

/s/ William W. Young
William W. Young, Presiding Judge

/s/ Richard N. Koehler
Richard N. Koehler, Judge

/s/ James E. Walsh
James E. Walsh, Judge

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN FAILING TO REVERSE THE BZA'S DECISIONS ON THE BASIS THAT THOSE DECISIONS WERE CONTRARY TO LAW, ARBITRARY, CAPRICIOUS, UNREASONABLE, AND UNSUPPORTED BY THE PREPONDERANCE OF SUBSTANTIAL, RELIABLE, AND PROBATIVE EVIDENCE.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN FAILING TO REVERSE THE DECISIONS OF THE BZA ON THE BASIS THAT THE ZONING ORDINANCE, AS APPLIED, IS BLATANTLY UNCONSTITUTIONAL.

THIRD ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN DETERMINING THE MERITS OF THE ZONING APPEALS WITHOUT A COMPLETE RECORD, WITHOUT AFFORDING THE PARTIES AN OPPORTUNITY TO SUPPLEMENT THE RECORD, WITHOUT HOLDING A HEARING, WITHOUT BRIEFING, WITHOUT ARTICULATING THE APPLICABLE STANDARD OF REVIEW, AND WITHOUT DETERMINING THE LEGALITY AND CONSTITUTIONALITY OF THE BZA'S DETERMINATIONS.

THE SUPREME COURT OF OHIO

| | | |
|---|---|---|
| INTERSTATE INDEPENDENT CORPORATION, | : | 1998 TERM |
| Appellant, | : | CASE NO. 97-2506 |
| v. | : | |
| THE BOARD OF ZONING APPEALS FOR FAYETTE COUNTY AND THE VILLAGE OF OCTA, | : | E N T R Y |
| Appellees. | : | (Filed Feb. 18, 1998) |

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COST:

Docket Fee, $40.00, paid by Berkman, Gordon, Murray & DeVan.

(Fayette County Court of Appeals; Nos. CA9611026 & CA9611027)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

PROPOSITION OF LAW NO. 1

A ZONING ORDINANCE THAT IS INTERPRETED TO COMPLETELY EXCLUDE SPEECH-RELATED BUSINESSES AS PERMITTED USES WITHIN A VILLAGE'S BOUNDARIES IS UNCONSTITUTIONAL UNDER THE FIRST AND FOURTEENTH AMENDMENTS.

PROPOSITION OF LAW NO. 2:

AN ORDINANCE REQUIRING A PERMIT TO ENGAGE IN SPEECH-RELATED ACTIVITY AND VESTING DISCRETION IN THE ORDINANCE'S ENFORCEMENT AUTHORITY IS UNCONSTITUTIONAL AS A PRIOR RESTRAINT AND A TOOL OF CENSORSHIP.

PROPOSITION OF LAW NO. 3

THE FIRST AND FOURTEENTH AMENDMENTS MANDATE THAT ANY ZONING ORDINANCE REGULATING SPEECH-RELATED ACTIVITY MUST PROVIDE FOR A SHORT, FIXED TIME PERIOD FOR THE APPROVAL OR DENIAL OF A ZONING CERTIFICATE, AND FOR PROMPT JUDICIAL REVIEW IN THE EVENT OF A DENIAL.

PROPOSITION OF LAW NO. 4

DUE PROCESS REQUIRES THAT THE BZA'S DECISION NOT BE CONTRARY TO LAW, UNREASONABLE, ARBITRARY, OR CAPRICIOUS OR UNSUPPORTED BY SUBSTANTIAL PROBATIVE EVIDENCE.

IN THE COMMON PLEAS COURT OF FAYETTE COUNTY, OHIO

| | | |
|---|---|---|
| INTERSTATE INDEPENDENT CORPORATION, | : | |
| | : | CASE NO. 940284 CVH |
| Appellant, | | 950013 CVH |
| | : | |
| -vs- | | JUDGMENT ENTRY |
| | : | |
| THE BOARD OF ZONING APPEALS FOR FAYETTE COUNTY AND THE VILLAGE OF OCTA, | : | (Filed Oct. 11, 1996) |
| | : | |
| Appellee. | : | |

In these cases, appellant appeals from decisions of the Fayette County Board of Zoning Appeals which denied appellant's application for a zoning permit.

In August, 1994, the Board of Zoning Appeals considered appellant's application for a zoning certificate for the use of property located at 9017 West Lancaster Road, in the Village of Octa, for an adult video arcade and a clothing and gift boutique. After a public hearing, the Board found that the operation of these businesses was not a principal permitted use under the Village Zoning Ordinance. The Board also found that the operation of an adult video arcade would be an economic detriment to the area and therefore denied appellant's application for a conditional use permit for that business. The Board found that the operation of a clothing and gift boutique is not a proper use in a highway service district and accordingly denied appellant's application for a conditional use permit for

that business also.

In December, 1994, the Board again considered whether the operation of an adult video arcade is a principal permitted use under the Village of Octa zoning ordinance. After a public hearing, the Board found that the operation of such a business was not a principal permitted use and denied appellant's application for a zoning certificate. The board also found that the business was not in operation at the time the zoning ordinance was enacted and therefore not entitled to a certificate as a continuing existing use.

Appellee contends that this appeal should be dismissed because appellant failed to file a supersedeas bond. Revised Code section 2505.06 does require the filing of a bond to effect "an appeal upon questions of law and fact . . . ." In its notice of appeal, the appellant indicates that this appeal is "on questions of law." The Delaware County Court of Appeals has held that the filing of a bond is not required in order to perfect an appeal concerning only questions of law. American Aggregates Corporation v. Concord Township, et al, 90-ca-32 *(sic)*, 90-CA-33, Delaware Co. Ct. App. (April 11, 1991). Appellee's motion to dismiss is denied.

After reviewing the records of these proceedings, the court finds that the orders of the Fayette County Board of Zoning Appeals are reasonable and supported by substantial and reliable evidence. It is accordingly ordered that the decisions of the Fayette County Board of Zoning Appeals in these matters are affirmed.

/s/ Victor Pontious, Jr.
Victor Pontious, Jr.
Judge

Direction to the Clerk:
Serve upon all parties not in default
for failure to appear notice of this judgement
and its date of entry upon the journal

FAYETTE COUNTY, OHIO
BOARD OF ZONING APPEALS

Eric Kriegar, Chairman
Ron McCoy
Jeff Sollars
Ron Rockhold
Ron Campbell

The Fayette County Board of Zoning Appeals met in public session on the 3rd day of August 1994, to consider the Notice of Appeal of Interstate Independent Corp. from Adverse Determination of the Zoning Inspector and Notice of Application by Interstate Independent Corp. for Conditional Uses dated June 22, 1994. The notice requested this board to review the decision of the Village of Octa, Ohio, Zoning Inspector, Chester Dean, which denied the applicant's requests for zoning certificates to use property in the village for an adult video arcade and a clothing and gift boutique. The notice further requested a hearing on their applications for conditional use permits to use the same property for an adult video arcade and a clothing and gift boutique should the board affirm the decision of the zoning inspector in denying the applications for zoning certificates. Present at the hearing on the notice of appeal was the full board consisting of five members, Mr. Jeremy Rosenbaum, attorney for their applicant, Interstate Independent Corp, numerous citizens from the area. Neither the corporation officials nor the property owners were present.

The statements from those present were received by the Board at the same time as to all four matters on the agenda, the two applications for review of the zoning inspector's denial of zoning certificates to operate an adult video arcade and a clothing store and gift ship and the two applications for conditional use permits for the same uses as the zoning

certificates should the board affirm the decision of the zoning inspector. Statements were taken from anyone present who wished to speak. Mr. Rosenbaum spoke first and was afforded an opportunity to respond to each speaker's statement immediately afterward. No oaths were administered to any of the speakers. While no one was informed of a right to cross-examine any speakers, all were indeed free to do so and did on several occasions ask questions of the speakers as well the speakers asking questions of Mr. Rosenbaum.

First, the attorney for the corporation made statements on behalf of the corporation requesting the board to reverse the zoning inspector's denial of the zoning certificates and in the alternative to permit the requested conditional uses. His statement indicated the belief that the applicants were entitled to a zoning permit and that the applicants for conditional uses were a distant second choice of the applicants. Indeed, when the board asked the attorney what conditions the applicants could accept should the board affirm the decision of the zoning inspector as to the zoning certificates, he replied they could not accept any conditions as they felt they were entitled to the zoning certificates. This decision would therefore be based mainly on the information supplied to the board with the written applications and any information supplied by the attorney at the hearing, which was almost nonexistent. No one else spoke on behalf of the corporation.

Those speaking in opposition to the application included several area landowners, several area business owners and several area residents interested in the proceedings. The testimony of Mr. Glenn Rankin, Octa Planning Commission member, that indicates the travelling public was the main concern of the planning commission when the zoning ordinance

was enacted. Mr. Bob Minor, an adjacent property owner, stated his property value decreased due to the previous operation of the adult video arcade. Mr. Mike Bellis, owner of a local business stated almost all of the development in the highway service district was on the east side of Interstate 71, with many new businesses have opened recently. The west side of the interstate has not been further developed except for the adult video arcade and the adult bookstore which are operated by the same persons. Mr. Jerry Moorman, owner of a local business, stated the same thing as to the economic development. Mr. Lawrence Dumford, a former county commissioner, placed evidence in the record, a transcript of the testimony from a real estate agent at the hearing on a permanent injunction to enjoin these same persons from opening an adult video arcade at this same location. The testimony indicated that there were few companies inclined to develop the area surrounding the adult video arcade and adult bookstore. Further, Mr. Dumford indicated he had communicated with numerous businesses to inform them of the impending sale of a parcel of land adjacent to the land owned by the same applicants herein. These businesses refused to bid on this property for the specific reason that they would not be a successful business if they opened up next to an adult video arcade and adult bookstore. A question was posed to Mr. Rosenbaum as to the number of adult video arcades that are adjacent to the interstate between Cincinnati and Cleveland. His answer was that he was unsure but he knew of several. A restaurant manager from the restaurant across the street indicated that the reputation of this intersection of the interstate was know as far away as Nashville, Tennessee for its previous adult video arcade and present adult bookstore and the reputation was not positive.

The testimony from the applicants was by their attorney

who professed limited knowledge as to the wishes and desires of his client beyond the above statements and had few specific answers to questions posed to him. Most of the questions revolved around the type of clothing that would be for sale in the clothing store. Mr. Rosenbaum refused to state the type of clothing his client intended to offer for sale.

From the record before this board it appears that on April 13, 1994, Frank Findo and Michele Moran and the Interstate Independent Corp. applied for a zoning certificate to use property located at 9017 W. Lancaster Rd., Octa, Ohio, as an adult video arcade. The property is located in an area designated Highway Service by the Village of Octa, Ohio, Zoning Ordinance. The application was denied by the village zoning inspector, Chester Dean, on May 3, 1994, by letter. The two reasons stated for the denials were: 1) the Common Pleas Court, Fayette County, Ohio, had permanently enjoined this property from being used as an adult video arcade, and 2) an adult video arcade does not conform to the principal uses outlined in a highway service area.

On May 12, 1994, Frank Findo, Michele Moran and the Interstate Independent Corp. applied for a zoning certificate to use the same property above as a clothing and gift boutique. The application was denied by the village zoning inspector, Chester Dean on June 6, 1994, by letter. The reason stated for the denial was that although a gift shop may be considered a principal use in the Octa Highway Service area, a retail clothing store is not.

On June 16, 1994, Frank Findo, Michele Moran and the Interstate Independent Corp. applied for a zoning certificate to use the same property above as a restaurant. The application

was approved by the village zoning inspector. Chester Dean on July 6, 1994, and is Certificate No. 9432.

On June 22, 1994, the Interstate Independent Corp. made two applications for conditional use of the same property above: 1) for use as an adult video arcade, and 2) as a retail clothing and gift store. These applications attached and incorporated by reference all information contained in their applicants for zoning certificates for the respective uses. Also, on June 22, 1994, the applicants filed the notice of appeal stated above.

All matters requested to be decided in the Notice were referred to this board, as the Village of Octa, Ohio, Zoning Ordinance Article 14.1 states "It is hereby established that all the provisions herein and subsequently amended hereto, shall be enforced by the Zoning Authorities of Fayette County, Ohio, in accordance with the provisions of Articles 14 and 15 of the Fayette County Zoning Resolutions as adopted by the Board of Fayette County Commissioners, which enforcement service shall be contracted for by the Village and the County pursuant to O.R.C. Sect. 713.11 'A' & 'B' as amended. If any provisions of this Resolution is in conflict with the provisions of the County Resolution, the provisions herein will control." The contract to enforce the Village of Octa Zoning Ordinance was signed by all parties on November 13, 1992. Therefore, the Fayette County Board of , *(sic)* Zoning Appeals is the proper board to hear these matters and must use the County Zoning Resolution as its guide except where conflicts exist. Where conflicts between the two documents exist the village zoning ordinance will control.

To reverse any order of the zoning inspector or to decide in favor of an applicant in any matter of which the board has original jurisdiction, i.e., the applications for conditional use

permits, requires a concurring vote of three (3) members of the board, pursuant to the Fayette County, Ohio, Zoning Resolution, Article 15.2. The board, after a hearing, may affirm, reverse, vacate, or modify the decision complained of in the appeal. In considering an application for a conditional use the board shall give due regard to the nature and condition of all adjacent uses and structures and the board may impose such requirements and conditions with respect to location, construction, maintenance and operation - in addition to those expressly stipulated in the Village of Octa, Ohio, Zoning Ordinance.

The denial of the application for a zoning certificate to use property located at 9017 W. Lancaster Rd., Octa, Ohio as an adult video arcade as such use is not a principal permitted use is affirmed. Board member Rockhold moved to uphold the decision of the zoning inspector as the operation of an adult video arcade is not a principal use in a highway service district. Board member McCoy seconded the motion. The motion carried unanimously. The principal permitted use of a highway service district is any retail business, service establishment or office serving primarily the highway traveler. Several illustrative examples are given of types of businesses which serve primarily the highway traveler. An adult video arcade is, not in the same classification as these examples. While it is true that some highway travelers may find the type of service or items for purchase in an adult video arcade to be something they would purchase, that alone does not make this type of business that which serves primarily the highway traveler. The illustrations suggest the type of businesses and services which fit this district.

The denial of the application for a zoning certificate to use the same property above as a clothing and gift boutique is

likewise affirmed. Board member Sollars moved to uphold the decision of the zoning inspector as the operation of a clothing and gift boutique is not a principal use in a highway service district. Board member Campbell seconded the motion. The motion carried unanimously. A retail clothing store is not a principal permitted use in a highway service district. This type of business does not fit the type of business envisioned for the highway service district as shown by the examples listed in the zoning ordinance. Furthermore, the application submitted by the corporation does not specify how much of the store would be used for each purpose. It is therefore possible that should a zoning certificate be granted for he *(sic)* use stated in the application that a large part of the store could be designated for the sale of clothing and a small part for the sale of gifts. This would have the effect of circumventing the zoning ordinance, which cannot be permitted.

It should be further noted that the application of the same parties for the use of the property as a restaurant was granted by the zoning inspector. This gives the applicant a use for their property which is in harmony with the principal permitted uses of a highway service district.

The application for a conditional use permit to operate an adult video arcade is denied. Board member Sollars moved to deny the application for a conditional use permit due to its economic detriment to the area. Board member Campbell seconded the motion. The motion carried unanimously. From the statements and other information provided to the board it appears the operation of such a facility would be an economic detriment to the community. The testimony of the applicants' attorney, while a summary of the request of his client, does not take the place of in person testimony from those able to know.

The Village of Octa, Ohio, Zoning Ordinance allows a party to appear in person or by attorney but there is still a burden on the applicant to place upon the record sufficient information for the board to make a decision in their favor.

The application for a conditional use permit to operate a clothing and gift boutique is denied. Board member McCoy moved to deny the application for a conditional use permit as it is not a proper use in a highway service district but would be better suited in a commercial district. Board member Rockhold seconded the motion. The motion carried unanimously.

This is the holding of the board by those who have signed below.

/s/ Eric Krieger
Eric Krieger, Chairman

Concur:

/s/ Ron Rockhold
Ron Rockhold

/s/ Ron McCoy
Ron McCoy

/s/ Ron Campbell
Ron Campbell

/s/ Jeff Sollars
Jeff Sollars

FAYETTE COUNTY, OHIO
BOARD OF ZONING APPEALS

---

Eric Kriegar, Chairman
Ron McCoy
Jeff Sollars

Ron Rockhold
Ron Campbell

DECEMBER 6, 1994
7:00 P.M.

The Fayette County Board of Zoning Appeals met at the Jefferson Township Office in Jeffersonville, Ohio. Board members present were Ron Rockhold, Jeff Sollars, Ron Campbell and Ron McCoy. Absent was Eric Krieger.

The first item of business was Mr. Joe Dillard of the Church of Christ in Christian Union, at 13723 Reid Road on Paint Township. Mr. Dillard was asking of a variance to build a garage for the church's parsonage within three feet of the property's side lot line. He explained that an existing garage, located within two feet of the side lot line, had been torn down. The location of the septic system prevented moving the garage away from the side lot line. He brought a letter from his adjoining neighbor stating that the neighbor had no objections to his intended building plans. Two (2) of the Paint Township Trustees were present (Mr. Keith Johnson and Mr. John Cock). They stated that for this specific situation and location, they would have no objections to a variance.

With no further discussion, Mr. Ron Rockhold made a motion to allow a variance to Mr. Joe Dillard to build a garage no closer than two feet to the property's side lot line. Mr. Ron Campbell seconded the motion. Motion passed unanimously.

The second item of business was the appeal of the Interstate Independent Corporation of the zoning inspector's denial of its' application for a zoning certificate applied for on September 13, 1993. The three reasons set forth in the notice of appeal were 1) the zoning inspector failed to notify the applicant, in writing, within thirty (30) days after its filing of the application of his refusal to issue the requested certificate, as required by Section 14.41; 2) the use applied for was an existing use at the time of the enacting of the village zoning ordinance and therefore entitled to a certificate as a continuing existing use under Section 6.02 of the zoning ordinance; 3) an adult video arcade is a principal permitted use in a highway service area.

Steven D. Shafron was present representing the interest for the Interstate Independent Corporation. His opening statement was that Interstate applied for a permit on September 13, 1993, and it was not ruled on until October 24, 1994, by the Zoning Inspector. He stated this is clearly more than thirty (30) days and that Interstate should be granted a permit immediately.

Mr. Shafron continued, stating that even though the adult arcade was closed, it was always in existence and therefore qualifies as a continuing existing use under the ordinance. He further state that the property had never been vacated nor any equipment ever removed from the premises.

Mr. Shafron's final point was that, according to the Twelfth District Court of Appeals ruling on October 18, 1994, the Octa Zoning Ordinance would be unconstitutional if the adult video arcade was not considered a principal permitted use in a highway service district.

The Board then asked Mr. Shafron some questions. First they asked if he was aware that the Fayette County Sheriff had auctioned all the equipment and contents of the Adult Video Arcade by order of the Court of Common Pleas of Fayette County, Ohio. The Board stated that this shows the Adult Video Arcade did not have an uninterrupted existence. Mr. Shafron responded, "I stand corrected."

The Board also asked Mr. Shafron if his statement concerning the Twelfth District Court of Appeals was an actual statement or his opinion. Mr. Shafron indicated that it was his opinion.

Next the Board asked Mr. Steven Eckstein, Fayette County Prosecuting Attorney, whether the Twelfth District Court of Appeals ruled that the zoning inspector was required to issue a zoning certificate to the Interstate Independnet *(sic)* Corporation as the inspector had indeed failed to respond to the application in the required time. Mr. Eckstein stated the opinion did not expressly order the inspector to issue a zoning certificate but that if the appellate ccourt *(sic)* had decided so it certainly could have ordered it done. Since they did not so order but instead ordered him to rule on the application the court permitted the inspector to rule either to grant the request or to deny it. The record reflects the zoning inspector ruled on the application six (6) days after receipt of the appellate court's decision ordering him to do so.

Mr. Eckstein was also asked to comment concerning the "Grandfathering" issue. He stated that the business should not be grandfathered since it was not in operation in November, 1992, when the zoning ordinance passed.

Mr. Ron Campbell moved that the adult video arcade was not in operation when the Octa zoning ordinance was enacted and therefore the appeal based on the businesses continuing existing use status be disallowed. The motion was seconded by Ron Rockhold. After a roll call vote, the motion passed unanimously.

Mr. Ron Rockhold moved the zoning inspector acted within the time limits required by the zoning ordinance and the the *(sic)* Twelfth District Court of Appeals decision. The motion was seconded by Mr. Jeff Sollars and passed unanimously by roll call vote.

Mr. Jeff Sollars moved that the Fayette County Board of Zoning Appeals stand by its August, 1994, decision that an adult video arcade is not a principal permitted use in a highway service district. The motion was seconded by Mr. Ron Rockhold and passed unanimously by roll call vote.

All issues being ruled on, the decision of the zoning inspector is upheld.

With no further business the Board adjourned.

Respectfully submitted
/s/ Daniel C. Dean
Asst. Zoning Inspector and
Secretary of the Fayette
County Zoning Board of Appeals

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

FAYETTE COUNTY

THE INCORPORATED VILLAGE OF OCTA, et al. :

: CASE NO. CA94-04-002

Plaintiff-Appellees, :

-vs- : OPINION

INTERSTATE ADULT ARCADE, et al., : (10/17/94)

: (Filed Oct. 17, 1994)

Defendant-Appellants :

Kiger & Kiger, David V. Kiger, 132 South Main Street, Washington C.H., Ohio 43160, for plaintiff-appellee, The Incorporated Village of Octa

Berkman, Gordon, Murray, Palda & DeVan, J. Michael Murray, Lorraine R. Baumgardner and Jeremy A. Rosenbaum, 2121 The Illuminating Building, 55 Public Square, Cleveland, Ohio 44113, for defendants-appellants

YOUNG, J. Defendant-appellant, Interstate Adult Arcade, appeals an order of the Fayette County Court of Common Pleas enjoining appellant from operating its business in violation of the zoning ordinance of plaintiff-appellee, the Village of Octa ("Octa"). This case began its crawl through the judicial system on July 15, 1992 when the Fayette County Court of Common

Pleas found that a nuisance existed at appellant's place of business because of lewd conduct that was occurring on the premises. The court issued a permanent injunction and ordered appellant's business closed for one year. This court affirmed that decision. Roszmann v. Lions Den (1993), 89 Ohio App.3d 775.

On November 13, 1992, Octa enacted a zoning ordinance establishing five districts: Agricultural, Residential, Highway Service, Commercial, and Industrial. Three of these districts are in use: Agricultural, Residential, and Highway Service. Appellant's business is located within the Highway Service district.

On August 8, 1993, appellant reopened its business. On August 20, 1993, Octa filed a complaint against appellant for violating Octa's zoning ordinance. Along with the complaint, Octa filed a motion for a temporary restraining order and an affidavit supporting the motion for a temporary restraining order. In the affidavit, Chester Dean, Octa's Zoning Inspector, stated that appellant was violating the ordinance because appellant was "selling the viewing of obscene and pornographic materials within the Village of Octa" and because appellant had not applied for and did not have a zoning permit. In an ex parte order, the trial court granted Octa's motion for a temporary restraining order on August 20, 1993.

On September 13, 1993, Dean received a letter from appellant explaining that it was an application for a zoning permit. Dean never acted on appellant's request because it was not filed on the forms Dean believed were necessary to properly apply for a zoning certificate.

On October 18, 1993, the trial court granted a preliminary injunction prohibiting appellant form using its property in violation of the zoning ordinance. On March 22, 1994, the trial court permanently enjoined appellant from operating any business activity on its property in violation of Octa's zoning ordinance.

On appeal, appellant alleges three assignments of error. In its first assignment of error, appellant claims that Octa's zoning ordinance is unconstitutional.

The constitutionality of lawfully enacted legislation will be presumed unless the challenger establishes that the legislation is unconstitutional beyond a reasonable doubt. Arnold v. Cleveland (1993), 67 Ohio St.3d 35, 38-39. In this case, appellant has failed to establish that Octa's zoning ordinance is unconstitutional.

Appellant argues that the statute is unconstitutional because there is not district within Octa's zoning scheme that would allow appellant's business to operate. Appellant also claims that the zoning ordinance is an unlawful prior restraint on its freedom of speech and expression.

As stated above, Octa's zoning ordinance divides the city into five districts and appellant's business is located in the Highway Services District. The ordinance provides that the permitted use for this district is "[a]ny retail business, service establishment or office serving primarily the highway traveler ***." Village of Octa, Zoning Ordinance 10.11. The Octa zoning ordinance does not contain any prohibition against adult theaters in a Highway Service District. Furthermore, the other four districts, Agricultural, Residential, Commercial and

Industrial, do not contain any prohibition against conduct, speech or expression. Accordingly, there is no indication in the ordinance, as written, that adult theaters are prohibited from operating in Octa.

Appellant also argues that the ordinance is unconstitutional because the zoning inspector is given discretion to grant or deny zoning permits. Generally, it is unconstitutional for government officials to have unbridled discretion when a licensing decision that may affect speech or expression is considered. See Lakewood v. Plain Dealer Pub. Co. (1988), 486 U.S. 750, 108 S.Ct. 2138. However, if neutral criteria are established in the ordinance which ensures that the licensing decision is not based on content and which ensures a solid foundation for judicial review, then the ordinance has passed constitutional muster. Id. at 760, 771.

In this case, the zoning ordinance does provide the zoning inspector with neutral criteria with which to determine if an applicant may receive a zoning permit. First, the zoning districts established in the ordinance contain specific criteria for determining a permissible use in the five designated districts. Second, the ordinance also contains specific criteria for the size, shape, capacity, location and other specifications regarding the building in Octa. The criteria are clearly established in the ordinance and are content-neutral because the criteria go to the type of business being operated and the type of structure for which a permit is sought.

Appellant also argues that the zoning ordinance is unconstitutional because the ordinance does not provide for prompt review of the outcome of an application. However, the zoning ordinance provides that the zoning inspector shall act

upon an application within thirty days after the application is filed. Village of Octa, Zoning Ordinance, 14.41. The zoning inspector shall either issue a zoning certificate or shall notify the applicant in writing of the denial of the certificate also with reasons for that denial within thirty days. Id. If an applicant is dissatisfied with the zoning inspector's decision, he may appeal the decision to the zoning board of appeals within twenty days of the zoning inspector's decision. Id. at 15.22. The board is required to set a hearing date within ten days of the appeal and to render a decision within thirty days after the final hearing. Id. at 15.23, 15.24. If the applicant is still unhappy with the denial of a permit, then the applicant may appeal the zoning board of appeals' decision to the Fayette County Court of Common Pleas. Id.

Since both the zoning inspector and the zoning board of appeals must act within a specified period of time, applicants have prompt review of their applications for zoning permits. Accordingly, appellant has failed to establish beyond a reasonable doubt that Octa's zoning ordinance is unconstitutional. Appellant's first assignment of error is overruled.

In its second assignment of error, appellant argues that the trial court erred in finding that it did not comply with the zoning ordinance. Specifically, appellant claims that the letter that Dean receive was an application for a zoning certificate pursuant to the requirements of Octa's zoning ordinance. Octa argues that appellant must file a specific zoning application. At the hearing for a permanent injunction, Octa's witnesses testified that the letter was not an application because the letter was not on proper forms, it was incomplete, argumentive, conclusory, and failed to specifically state that the zoning

inspector was allowed to view the premises. The trial court agreed with Octa and found that in order to be considered an application for a zoning certificate the application must be on one of the application forms.

However, the zoning ordinance itself and Dean's statements refute Octa's claim that the letter was insufficient to serve as an application. First, Dean admitted that the ordinance does not require that application be made on any specific form. Second, upon review of the ordinance, there is no requirement calling for the use of a particular form as an application. Rather, the ordinance provides, "[u]pon written request from the owner or tenant, the Zoning Inspector shall issue a Zoning Certificate for any building or premises existing at the time of the enactment of this Resolution certifying, after inspection, the extent and kind of use made of the building or premises an whether such use conforms to the provisions of this Resolution." Village of Octa, Zoning Ordinance 14.43.

Third, the forms that Dean sent to appellant clearly state that they were zoning applicants for Fayette County and not for Octa. Also, appellant's letter to Dean contains all of the information that the forms require. The forms require an applicant to provide a sketch of the building, a description of the type of building, the proposed use of the building, the position of the building on the property and the size of the building. Appellant's letter included the purpose and use of its property, who its customers would be, and appraisal of the property, a sketch of the building, the location of the building on the property and who to contact if there were any questions concerning the application.

Last, Section 14.3 of Octa's ordinance establishes that the

applicant must file plans which describe the building, the intended use of the building, the location of the building and any other information that may be needed to determine and provide for the enforcement of the ordinance. In this case, appellant's letter provides all that is required by the ordinance. Based on these facts and the language of the statute, it is unreasonable and improper to deny appellant's application on the grounds that it was a letter and not the proper form for applying for a zoning certification.

Appellant also argues that it was improperly denied a zoning certification because the trial court determined that its business was not a "grandfathered" use. The Octa ordinance establishes that businesses that were existing at the time the ordinance was enacted may continue to operate as a continuing existing use even if the use does not meet the requirements of the ordinance. Village of Octa Zoning Ordinance 6.02. The trial court ruled that appellant's business was not a "grandfather" use because it was not in operation when the statute was enacted. Appellant claims that the business was in use during the time that the statute was enacted even though it was under a one-year suspension.

It would be improper to rule on whether appellant may be "grandfathered" into the ordinance at this time because there was never a ruling on the merits of appellant's application. The trial court failed to follow the procedure outlined in the zoning ordinance when it ruled on the merits of appellant's application. The ordinance establishes that the zoning inspector first must determine if the applicant is entitled to a permit. Village of Octa Zoning Ordinance, 14.41, 15.22. If the applicant is dissatisfied with te result, then the applicant may appeal to the zoning board of appeals. Id. If the applicant disagrees with the zoning

board's decision, then the applicant may appeal to the court of common pleas to determine whether a permit will be granted. Id.

In this case, when the trial court ruled that appellant's business should not be granted a zoning permit, the procedural requirements of the zoning ordinance were not met because neither the zoning inspector nor the zoning board of appeals ruled on appellant's application. Octa claims that appellant did not apply for a permit. Yet, Octa argues it denied appellant a permit when it concluded that it was not a "grandfathered" use. Accordingly, this issue will not be ruled on at this time and should be addressed according to the procedure established in the zoning ordinance.

Finally, appellant argues that the trial court improperly ruled that its business was not a permitted use in the Highway Service District. However, the trial court did not rule whether or not it was a permitted use.

Based upon the foregoing, appellant's second assignment of error is sustained in part and overruled in part.

Appellant's third assignment of error argues that the trial court incorrectly granted a temporary restraining order enjoining appellant from operating its business. Appellant contends that the temporary restraining order was improperly granted because appellee and the trial court failed to meet the criteria established in Civ.R. 65(A).

Civ.R. 65(A) establishes the requirements that must be met before a temporary restraining order may be issued. In this case, the temporary restraining order was granted ex parte. In

order to grant an ex parte temporary restraining order, the movant must establish that: (1) "Immediate and irreparable injury, loss of damage will result to the applicant before the adverse party [***] can be heard in opposition," Civ.R. 65(A), and (2) the applicant's attorney must certify to the court, in writing, the efforts, if any, "which have been made to give notice and the reasons supporting his claim that notice should not be required." Civ.R. 65(A). Furthermore, all temporary restraining orders granted without notice "shall define the injury and state why it is irreparable and why it was granted without notice." Civ.R. 65(A).

In this case, the temporary restraining order is based on Octa's complaint and on Dean's affidavit. Both state that appellant is operating in violation of the ordinance, but neither allege damage or injury. Neither of these documents establish irreparable, immediate injury as required by Civ.R. 65(A). Furthermore, the trial court did not make any findings of fact or document the nature of any alleged injuries. Octa did not provide the trial court with any written statement explaining the efforts it had taken to give notice to appellant or why notice to appellant should not be required. Since Octa and the trial court failed to fulfill any of the requirements established in Civ.R. 65(A), appellant's third assignment of error is sustained.

Accordingly, the temporary restraining order, the preliminary injunction and the permanent injunction are vacated. Also, the trial court's decision which determined that appellant's letter was not an application is reversed, and this cause is remanded with orders for the zoning inspector to rule on the merits of the application. Octa's zoning ordinance is constitutional and the trial court's decision that appellant is not a "grandfathered use" under the ordinance is vacated.

Judgment affirmed in part, vacated in part, and reversed in part and remanded for further proceedings consistent with this opinion.

WALSH, P.J., and KOEHLER, J., concur.

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

FAYETTE COUNTY

| | | |
|---|---|---|
| THE INCORPORATED VILLAGE OF OCTA, et al., | : | CASE NO. CA94-04-002 |
| Plaintiffs-Appellees, | : | |
| -vs- | | JUDGMENT ENTRY |
| INTERSTATE ADULT ARCADE, et al. | : | (Filed Oct. 17, 1994) |
| Defendants-Appellant. | : | |

The assignments of error properly before this court having been ruled upon as heretofore set forth, it is the order of this court that the temporary injunction, the preliminary injunction and the permanent injunction are hereby vacated. The order finding the ordinance constitutional is affirmed. The order finding that appellant did not properly apply for a permit is reversed, and this cause is remanded with orders to appellee to rule on the merits of the application. Last, the order finding appellant's business is not a proper use is reversed.

It is further ordered that a mandate be sent to the Fayette County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed to appellee.

To all of which appellant and appellee, by their counsel, except.

/s/ James E. Walsh
James E. Walsh, Presiding Judge

/s/ Richard N. Koehler
Richard N. Koehler, Judge

/s/ William W. Young,
William W. Young, Judge

IN THE COURT OF APPEALS OF FAYETTE COUNTY, OHIO

THE INCORPORATED VILLAGE OF OCTA, et al.,

Appellees,

-vs-

INTERSTATE ADULT ARCADE, et al.,

Appellants.

: CASE NO. CA94-04-022

: ENTRY DENYING MOTION FOR RECONSIDERATION

: (Filed Nov. 28, 1994)

The above cause is before the court pursuant to an application for reconsideration filed by counsel for appellants, Interstate Adult Arcade, et al., on October 27, 1994, and a memorandum in opposition filed by counsel for appellees, The Incorporated Village of Octa, et al., on November 7, 1994. The test generally applied in deciding a motion to reconsider is whether or not the motion calls the court's attention to an obvious error in its decision or raises an issue for reconsideration which was either not considered at all or not fully considered when it should have been. Matthews v. Matthews (1981), 5 Ohio App.3d 140.

Appellants first assert that Section 6.01 of the zoning ordinance at issue mandates that all uses of land within the village *(sic)* of Octa conform to the uses listed in the ordinance or they are prohibited. Appellants argue that they cannot be considered a permitted use because of Octa's interpretation of the ordinance. In our opinion, however, we narrowly held that the statute as written is constitutional. The case was remanded

for consideration of appellants' application for a zoning permit. This issue was not and could not have been considered by the court at the time our decision was rendered.

Second, appellants argue that the zoning ordinance grants the zoning inspector unfettered discretion to issue zoning permits. This argument was fully addressed in our opinion. We specifically held that the statute does set forth objective criteria for considering zoning permits.

The third argument advanced by appellants is that the ordinance fails to provide for prompt review of a zoning application. Appellants argue that the zoning ordinance is constitutionally defective because the thirty-day period during which the zoning inspector must rule upon the zoning application is not definitive. Our opinion addresses the thirty-day period of the ordinance and finds it constitutionally firm.

Appellants also argue that this court misread the provisions of the zoning ordinance relating to the time requirements for review by the board of zoning appeals. Appellants are correct to the extent that this court misstated the time requirements for review by the zoning board of appeals on page 6 of our opinion. We stated that, "[t]he board if required to set a hearing date within ten days of the appeal and to render a decision withing thirty days after the final hearing." Section 15.23 of the zoning ordinance instead provides as follows:

> The Board shall fix a reasonable time for the hearing of the application or appeal, giving ten (10) days notice to the parties in interest, and decide the same within a reasonable time after it is submitted.

The above error, however, does not affect the court's decision. The arguments presented by appellants were fully briefed to the court and considered. We held that the procedure for hearing appeals was constitutionally valid. Appellants have provided us with no authority stating that the procedure at issue violates due process. Further, the cases cited by appellants are distinguishable.

Finally, appellants argue that the court failed to consider their argument that the ordinance at issue fails to guarantee prompt judicial review. On page 5 of our opinion, the court set forth appellants' argument that the ordinance does not provide for prompt judicial review and found that the argument lacked merit.

Based upon the foregoing, appellants have not called the court's attention to an obvious error in its decision or raised any issues for consideration that were either not considered at all or not fully considered. Matthews, supra. Accordingly, appellants' application for reconsideration is DENIED.

IT IS SO ORDERED.

/s/ James E. Walsh
James E. Walsh, Presiding Judge

/s/ Richard N. Koehler
Richard N. Koehler, Judge

/s/ William W. Young
William W. Young, Judge

THE SUPREME COURT OF OHIO

| | | |
|---|---|---|
| The Incorporated | : | 1995 Term |
| Village of Octa et al. | : | |
| Appellees, | : | To Wit: March 15, 1995 |
| | : | |
| v. | : | |
| | : | Case No. 94-2566 |
| Interstate Adult | : | |
| Arcade et al. | : | ENTRY |
| Appellants. | : | |

Upon consideration of the jurisdictional memoranda filed in this case, the Court dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Berkman, Gordon, Murray, Palda & Devan *(sic)*.

(Fayette County Court of Appeals; No. CA9404002)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

IN THE COURT OF COMMON PLEAS, FAYETTE COUNTY, OHIO

THE INCORPORATED VILLAGE
OF OCTA, et al.

Case No. 930262 CVH

Plaintiffs, ::

-vs- JUDGEMENT ENTRY

INTERSTATE ADULT (Filed Mar 22, 1994)
ARCADE, et al.,

Defendants. ::

At issue in this case is the applicability and constitutional validity of a village zoning ordinance. After a hearing on September 3, 1993, a preliminary injunction was granted to the plaintiffs purusant to an entry filed herein on October 15, 1993. The matter came on for final hearing on March 15, 1994, upon plaintiffs' complaint requesting a permanent injunction restraining the defendants from violating the Octa zoning ordinance, and upon defendant Interstate Independent Corporation's motion to dissolve the preliminary injunction.

FINDING OF FACTS

Plaintiff Village of Octa is located at the intersection of Interstate 71 and U.S. Route 35 in Fayette County, Oho. Ohio November 13, 1992, the Village Council enacted a zoning ordinance for the purpose of "promoting public health, safety,

morals and general welfare; to secure the most appropriate use of land and to facilitate adequate provision for public improvements . . . ." Octa Zoning Ordinance Section 1.00.

The village ordinance establishes five districts: Agricultural, Residential, Highway Service, Community Business District (Commercial), and Industrial. Three of these districts are in use: Agricultural, Residential, and Highway Service. Defendant Interstate Adult Arcade is located within the village in a Highway Service District. Except for continuing existing uses and nonconforming uses "legally existing at the time of the adoption" of the ordinance, an owner of property within the Village is required to apply for and obtain a "Zoning Certificate." Supra, sections 4.24, 6.02 and 14.41.

On July 15, 1992, the Fayette County Court of Common Pleas found that a nuisance existed at the premises of defendant Interstate Adult Arcade as a result of lewdness being conducted or permitted on the said premises. The Court issued a permanent injunction and ordered the defendants' business closed for one year. At a sheriff's sale in July, 1993, defendant Frank Findo purchased most of the personal property of the business and returned the items to the premises.

The defendant Interstate Adult Arcade resumed business activities in the Village of Octa in August, 1993. In September, 1993, village zoning inspector Chester Dean received a letter from James L. Keaton, an agent for defendant Interstate Independent Corporation dba Interstate Adult Arcade, concerning its application for a zoning certificate. On September 22, 1993, Mr. Dean sent Mr. Keaton an application form for a zoning certificate as well as a form to request a conditional usage. Said defendant received the forms but

neither was completed. No application for a zoning certificate or conditional usage has ever been filed on behalf of the defendant Interstate Adult Arcade with the said village zoning inspector.

## CONCLUSION OF LAW

The defendant contend, among other things, that the Octa zoning ordinance is an unlawful prior restraint on protected expression and unconstitutional as applied to their business. The purpose of the ordinance, as stated in its first section, is to promote "public health, safety, morals and general welfare (and) to secure the most appropriate use of land and to facilitate adequate provision for public improvements . . . ." The Court finds that this purpose is unrelated to the suppression of speech and, as such, is viewpoint neutral. No evidence was presented by the defendants showing that the ordinance was intended to regulate only their business. A review of the terms of the ordinance reveals, with respect to businesses engaged in constitutionally protected activity, that the ordinance is content neutral. The standard for constitutionality for a content neutral, time, place, and manner regulation is set forth in City of Renton v. Playtime Theatres Inc., 475 U.S. 41 (1986). That standard is whether the regulation serves a substantial governmental interest and whether there are reasonable alternative means of communication available to the regulated entity. Clearly, the Village of Octa has a significant interest in the use and development of land within its boundaries. Enforcement of the ordinance does not necessarily mean that the defendants' business is excluded from the Village. The effect of the ordinance may be to limit the operation of defendants' business to certain portions of the Village. But this was not found to be

constitutinally offensive by the Untied States Supreme Court in the Renton case referred to above.

The defendants also contend that the ordinance is unconstitutonally vague. The Supreme Court has held, however, that mathematical precision is not required even when the regulation is directed toward speech. Grayned v. City of Rockford, 408 U.S. 104 (1972). The court finds that a person of ordinary intelligence could, upon reading the ordinance, determine what it requires. For this reason the court finds defendants' vagueness contention to be without merit.

The defendants argue that their use of the premises preceded passage of the ordinance and is a "continuing existing use" and as such, is permitted by section 6.02 of the ordinance. The evidence established, however, that pursuant to Court order, the defendants' business was not in operation in November, 1992, when the ordinance was enacted. Accordingly, the court finds as a matter of law that section 6.02 of the Village ordinance is inapplicable.

It is also defendants' contention that the Village of Octa did not comply with statutory notice requirements before enacting its zoning ordinance. No evidence was presented by defendants in support of this claim. The Ohio Supreme Court has held that ordinances are entitled to a presumption of constitutional validity, and that the challenger must establish that the regulation is unconstitutional beyond a reasonable doubt. Arnold v. Cleveland, 67 Ohio St.3d 35 (1993). The court finds that the zoning ordinance enacted by the Village of Octa at issue in this case is constitutionally valid.

Defendants argue that their September, 1993, letter to

village zoning inspector Chester Dean is an application for a zoning certificate and that since Mr. Dean did not formally deny their "application" within thirty days, they are entitled to a zoning certificate. After receiving their letter, Mr. Dean sent application forms to the defendants. Section 14.41 of the Octa Zoning Ordinance provides that:

> . . . The Zoning Inspector shall act upon all . . . applications . . . within thirty (30) days after the date they are filed in full compliance with all the applicable requirements . . . He shall either issue a Zoning Certificate within said thirty (30) days or shall notify the applicant in writing of his refusal . . . and the reason therefore. Failure to notify the applicant in case of such refusal within the said thirty (30) days shall entitle the applicant to a Zoning Certificate . . . .

From the evidence presented it is apparent that the application forms provided to the defendants are required and routinely used by the zoning inspector in evaluating applications for zoning certificates as well as applications for conditional usage. The forms are one page documents. To apply for a conditional usage, the applicant must sign the form and pay a fee of twenty five dollars. To apply for a zoning certificate, the form requires the signature of both the applicant and the property owner. The zoning inspector did not regard defendants' letter as either an application for a zoning certificate or as an application for conditional usage. Defendants offer no explanation as to their failure to complete either of these required forms. Under these circumstances, the court finds that the defendants' letter of September, 1993, was neither an application for a zoning certificate nor an application for

conditional usage. Since section 14.41 of the Village Zoning Ordinance applies only where ". . . applications . . . are filed in full compliance with all applicable requirements . . .", the court finds that the defendants are not entitled to a zoning certificate under this section.

Revised Code section 713.13 authorizes a municipal corporation to request an injunction "to prevent or terminate" the violation of a local zoning ordinance. For the reasons set forth above, plaintiffs' request for a permanent injunction is granted, and defendants' motion to dissolve the preliminary injunction is denied.

There being no evidence presented as to what, if any, interest defendants Michelle Robinette Moran and Michael F. Moran have in this proceeding, said defendants are dismissed as parties.

This entry does not determine the merits of defendant Interstate Independent Corporation's counterclaim. Final judgement having been rendered in favor of the plaintiffs, the court finds pursuant to Ohio Civil Rule 54 (B) that there is not just reason for delay.

It is accordingly ordered pursuant to Ohio Revised Code section 713.13, that the defendants are permanently restrained and enjoined from operating or conducting any business activities whatsoever at the property known as the Interstate Adult Arcade, 9017 Lancaster Road NW, Jeffersonville, Ohio 43128, in violation of the zoning ordinance of the Village of Octa.

Costs to be paid by defendants.

/s/ Victor Pontious, Jr.
Victor Pontious, Jr.
Judge

Copies mailed this filing date to the following:

Attorney for Plaintiff: David V. Kiger
Attorney for Defendant: J. Michael Murray, Jeremy A. Rosenbaum and Steven D. Shafron

/s/ Assignment Clerk
Assignment Clerk

IN THE COURT OF COMMON PLEAS, FAYETTE COUNTY, OHIO

THE INCORPORATED VILLAGE
OF OCTA, et al.

CASE No. 930262 CVH

Plaintiffs, ::

-vs- JOURNAL ENTRY

INTERSTATE ADULT
ARCADE, et al., (Filed Oct 15, 1993)

Defendants. ::

This case concerns the applicability and constitutional validity of a local zoning ordinance. An evidentiary hearing was held on September 3, 1993, upon the application of plaintiff Village of Octa for a preliminary injunction, and upon the motions of defendants requesting that this Court's Temporary Restraining Order be dissolved and that an order be issued granting defendants a preliminary injunction.

## FINDINGS OF FACT

The Village of Octa is located at the intersection of Interstate 71 and State Route 35 in Fayette County, Ohio. On November 13, 1992, the Village enacted a zoning ordinance for the purpose of "promoting public health, safety, morals and general welfare . . . (and) to secure the most appropriate use of land and to facilitate adequate provision for public

improvements . . . ." Octa Zoning Ordinance Section 1.00.

On July 15, 1992, the Fayette County Court of Common Pleas found that a nuisance existed at the premises of defendant Interstate Adult Arcade as a result of lewdness being conducted or permitted on the said premises. The Court issued a permanent injunction and ordered the defendants' business closed for one year.

The Village ordinance establishes five districts. Three of these districts are in use: Agricultural, Residential, and Highway Service. Defendant Interstate Adult Arcade is located within the village in a Highway Service District. Except for continuing existing uses and nonconforming uses "legally existing at the time of the adoption" of the ordinance, an owner of property within the Village is required to apply for and obtain a "Zoning Certificate." Supra, sections 4.24, 6.02 and 14.41.

The defendant Interstate Adult Arcade resumed business activities in the Village of Octa in August, 1993. No application for a zoning certificate has ever been filed on behalf of the defendant Interstate Adult Arcade with the said Village.

## CONCLUSION OF LAW

The defendant contend, among other things, that the Octa zoning ordinance is an unlawful prior restraint on protected expression and unconstitutional as applied to their business. The purpose of the ordinance, as stated in its first section, is to promote "public health, safety, morals and general welfare (and) to secure the most appropriate use of land and to facilitate adequate provision for public improvements . . . ." The

Court finds that this purpose is unrelated to the suppression of speech and, as such, is viewpoint neutral. No evidence was presented by the defendants showing that the ordinance was intended to regulate only their business. A review of the terms of the ordinance reveals, with respect to businesses engaged in constitutionally protected activity, that the ordinance is content neutral. The standard for constitutionality for a content neutral, time, place, and manner regulation is set forth in City of Renton v. Playtime Theatres Inc., 475 U.S. 41 (1986). That standard is whether the regulation serves a substantial governmental interest and whether there are reasonable alternative means of communication available to the regulated entity. Clearly, the Village of Octa has a significant interest in the use and development of land within its boundaries. Enforcement of the ordinance does not necessarily mean that the defendants' business is excluded from the Village. The effect of the ordinance may be to limit the operation of defendants' business to certain portions of the Village. But this was not found to be constitutionally offensive by the Untied States Supreme Court in the Renton case referred to above.

The defendants also contend that the ordinance is unconstitutionally vague. The Supreme Court has held, however, that mathematical precision is not required even when the regulation is directed toward speech. Grayned v. City of Rockford, 408 U.S. 104 (1972). The court finds that a person of ordinary intelligence could, upon reading the ordinance, determine what it requires. For this reason the court finds defendants' vagueness contention to be without merit.

The defendants argue that their use of the premises preceded passage of the ordinance and is a "continuing existing use" and as such, is permitted by section 6.02 of the ordinance.

The evidence established, however, that pursuant to Court order, the defendants' business was not in operation in November, 1992, when the ordinance was enacted. Accordingly, the court finds as a matter of law that section 6.02 of the Village ordinance is inapplicable.

Finally, it is defendants' contention that the Village of Octa did not comply with statutory notice requirements before enacting its zoning ordinance. No evidence was presented by defendants in support of this claim. The Ohio Supreme Court has held that ordinances are entitled to a presumption of constitutional validity, and that the challenger must establish that the regulation is unconstitutional beyond a reasonable doubt. Arnold v. Cleveland, 67 Ohio St.3d 35 (1993). The Court finds as a matter of law that the zoning ordinance enacted by the Village of Octa and issue in this case is constitutionally valid.

For the reasons set forth above, plaintiffs' motion for a preliminary injunction is granted, and defendants' similar motion is denied. Accordingly, until further order of the Court, the defendants are restrained and enjoined from operating or conducting any business activities whatsoever at the property known as the Interstate Adult Arcade, 9017 Lancaster Road NW, Jeffersonville, Ohio 43128.

The Court finds defendants' motion to dissolve the Temporary Restraining Order moot.

/s/ Victor Pontious, Jr.
Victor Pontious, Jr.
Judge

COPIES OF THIS ENTRY WERE SERVED ON ALL PARTIES LISTED BELOW BY ORDINARY MAIL THIS FILING DATE:

Attorney for Plaintiff: Kiger & Kiger
Attorney for Defendant: J. Michael Murray, Jeremy A. Rosenbaum

/s/ Assignment Clerk
Assignment Clerk

IN THE COURT OF COMMON PLEAS, FAYETTE COUNTY, OHIO

| | | |
|---|---|---|
| THE INCORPORATED VILLAGE OF OCTA, et al. | : | Case No. 930262CVH |
| Plaintiffs, | : | |
| -vs- | : | TEMPORARY RESTRAINING ORDER |
| INTERSTATE ADULT ARCADE, et al., | : | (Filed Aug. 20, 1993) |
| Defendants. | : | |

The Court coming on sua sponte pursuant to its inherent authority under Civil Rule 65(A) and upon the motion of the Zoning Inspector of Fayette County, Ohio and the Village of Octa and upon the verified affidavits and complaint filed herein, finds that said motion is well made, and

IT IS, THEREFORE, THE ORDER OF THIS COURT that the defendants are hereby restrained and enjoined from operating, conducting any business activities or opening their doors for any purpose whatsoever at the property better known as the Interstate Adult Arcade located at 9017 Lancaster Road NW, Jeffersonville, Ohio 43128.

IT IS THE FURTHER ORDER OF THIS COURT that bond is hereby waived pursuant to Civil Rule 65(C) as the Village of Octa is a Municipal Corporation and bond is not required of it.

IT IS THE FURTHER ORDER OF THIS COURT that the Sheriff of Fayette County, Ohio be and is hereby directed to

serve a copy of this Temporary Restraining Order forthwith upon the defendants at defendants place of business 9017 Lancaster Road NW, Jeffersonville, Ohio 43128 and if the defendants cannot be found thereon, then the aforesaid Temporary Restraining Order shall be served upon the manager or any employee of the aforesaid Arcade and a copy thereof shall be posted on all doors of the premises and the Sheriff is further ordered to enforce said Temporary Restraining Order according to the laws of the State of Ohio and this cause is hereby continued.

/s/ Victor D. Pontious, Jr.
Judge

## AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * *

## AMENDMENT XIV

### Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

VILLAGE OF OCTA, OHIO ZONING ORDINANCE

* * * *

4.14 District, More Restricted or Less Restricted: Each of the districts in the following listing shall be deemed to be more restricted than any of the districts succeeding it and each shall be deemed to be less restricted than any of the other districts preceding it: A, R, C, HS, M.

* * * *

ARTICLE 5

DISTRICTS AND BOUNDARIES THEREOF

5.0 For the purpose of this Ordinance, the Incorporated Village of Octa, Fayette County, Ohio, is and may be hereafter divided into the following types of districts:

A - Agricultural District
R - Residential District
HS - Highway Service District
C - Community Business District (Commercial)
M - Industrial District

* * * *

ARTICLE 6

GENERAL PROVISIONS

6.01 Conformance Required: Except as hereinafter specified,

no land, building, structure or premises shall hereafter be used and no building or part thereof or other structure shall be located, erected, moved, reconstructed, extended, enlarged, or altered except in conformity with the regulations herein specified for the district in which it is located.

6.02 Continuing Existing Uses: Except as hereinafter specified, any use, building or structure existing at the time of the enactment of this Resolution may be continued even though such use, building or structure may not conform with the provisions of this Resolution or the district in which it is located.

6.03 Nonconforming Uses: No existing building or premises devoted to a use not permitted by this Resolution in the district in which such building or premises is located, except when required to do so by law or order, shall be enlarged, extended, reconstructed, substituted or structurally altered unless the use thereof is changed to a use permitted in the district in which such building or premise is located, except as follows:

* * * *

6.032 Discontinuance: No building, structure or premises of a nonconforming use which has ceased for two (2) years or more shall again be put to a conforming use.

* * * *

ARTICLE 7

A - AGRICULTURAL DISTRICT

7.1 Principal Permitted Uses:

7.11 Agriculture, including Animal and Poultry Husbandry

7.12 Single-Family Dwellings

7.13 Churches

7.14 Private and Public School

7.15 Private Noncommercial Recreation Facilities

7.16 Noncommercial Clubs, Fraternities and Lodges

7.17 Commercial Signs and Billboards, subject to the requirements of Section 12.31.

7.18 Public Utility Facilities

* * * *

ARTICLES 8

R - RESIDENTIAL DISTRICT

8.1 Principal Permitted Uses

8.11 Single-Family and Two Family Dwellings

Trailers are not permitted in a Residential District which is a platted subdivision and consists of lots under FIVE (5) acres.

8.12 Public and Private Schools

8.13 Churches

* * * *

ARTICLE 10

HS - HIGHWAY SERVICE DISTRICT

10.1 Principal Permitted Uses:

10.11 Any retail business, service establishment or office serving primarily the highway traveler, such as hotels, motels, service stations, gift shops or restaurants.

* * * *

ARTICLE 14

ENFORCEMENT

* * * *

14.3 Filing Plans: Every application for a Zoning Certificate shall be accompanied by plans in duplicate drawn to scale in black or blue-line print. *(sic)* showing (on the basis of survey) the actual location, shape and dimensions of the lot to be built upon or to be changed in its use in whole or in part; the exact location, size and height of any building or structure to be erected or

altered; the existing and intended use of each building or structure or any part thereof; the number of families or housekeeping units the building is designed to accommodate; and when no buildings are involved, the location of the present use and proposed use to be made of the lot; such other information with regard to the lot and neighboring lots as many be necessary to determine and provide for the enforcement of this Resolution. One (1) copy of such plans shall be returned to the owner when such plans have been approved by the Zoning Inspector, together with such zoning certificate as may be granted.

* * * *

14.4 Zoning Certificate:

14.41 It shall be unlawful for an owner to sue or to permit the use of any structure, building, or land, or part thereof, hereafter created, erected, changed, converted or enlarged, wholly or partly, until a Zoning Certificate shall be issued by the Zoning Inspector. Such Zoning Certificate shall show that such building or premises, or part thereof, and the proposed methods of water supply and disposal of sanitary waste conformed with all the requirements of this Resolution.

No permit for the excavation and construction shall be issued by the Zoning Inspector unless the plans, specifications, and the intended use conform with the provisions of this Resolution.

The zoning Inspector shall act upon all such

applications on which he is authorized to act within the provisions of this Resolution within thirty (30) days after the date they are filed in full compliance with all the applicable requirements as specified under Section 14.2. He shall either issue a Zoning Certificate within said thirty (30) days or shall notify the applicant in writing of his refusal of such Certificate and the reasons therefor.

Failure to notify the applicant in case of such refusal within the said thirty (30) days shall entitle the applicant to a Zoning Certificate unless the applicant consents to an extension of time.

* * * *

ARTICLE 15

BOARD OF ZONING APPEALS

15.22 When and By Whom Taken: An appeal to the "Board may be taken by any person aggrieved or by any officer of the County affected by any decision of the Zoning Inspector. Such appeal shall be taken within twenty (20) days after the decision by filing with the Zoning Inspector and with the Broad a Notice of Appeal specifying the grounds thereof. The Zoning Inspector shall forthwith transmit to the Board all the papers constituting the record upon which the action appealed form was taken.

15.23 Hearings: The Board shall fix a reasonable time for the hearing of the application or appeal, giving ten (10) days notice to the parties in interest, and decide the same within a reasonable time aft3er it is submitted. Each application or appeal shall be accompanied by a check payable to the treasurer of Fayette County or a cash payment sufficient in amount to cover the cost of publishing and/or posting and mailing the notices of the hearing or hearing. At the hearing any party may appear in person or by attorney. A party adversely affected by the decision of the Board may appeal to the Count *(sic)* of Common Pleas of Fayette County on the ground that the decision was unreasonable or unlawful. The court may affirm, reverse, vacate and modify the decision complained of in the appeal.